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No. 99-___

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In The

Supreme Court of the United States

KATHRYN I. BLANKENSHIP,

Petitioner,

v.

The Honorable ALAN A. McDONALD,
United States District Court Judge, *et al.*,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

JAMES E. LOBSENZ*
of CARNEY BADLEY SMITH & SPELLMAN
2200 Columbia Center
701 Fifth Avenue
Seattle, WA 98104-7091
(206) 622-8020
*Counsel of Record

VICTORIA VREELAND
of GORDON THOMAS HONEYWELL MALANCA PETERSON & DAHEIM
600 University Street,
Suite 2101
Seattle, WA 98101-4185
(206) 447-9505

Counsel for Petitioner

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COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTIONS PRESENTED

1. Does a nonparty witness who appears and testifies "in any court of the United States" have a cause of action under 42 U.S.C. § 1985(2) against persons "who conspire . . . to injure such party or witness in his person or property on account of his having so attended or testified"?

2. By excluding judicial branch employees from the provisions of the Civil Service Reform Act which allow employees to obtain administrative or judicial review of adverse personnel actions, did Congress intend to preclude such an employee from bringing a *Bivens* action to challenge a termination motivated by a desire to retaliate against the employee for having given truthful testimony about her judicial employer?

3. Is the ability to file an EEO complaint with the local District Court's EEO Coordinator, combined with the Back Pay Act, a constitutionally adequate remedy for an unconstitutional job termination where the persons who will decide how to dispose of the EEO complaint are the same persons who terminated the complainant?

4. Does the Constitution itself require a judicially fashioned damages remedy in the absence of any other remedy to vindicate the violation of an underlying constitutional right, or may judicial branch employees simply be left with no remedy whatsoever for redress of the deliberate violation of their constitutional rights?

PARTIES TO THE PROCEEDINGS

Petitioner, the plaintiff/appellant below, is Kathryn I. Blankenship. The respondents, defendants below, are The Honorable Alan A. McDonald, United States District Court Judge for the Eastern District of Washington, and his marital community; and James R. Larsen, Clerk of the United States District Court for the Eastern District of Washington, and his marital community.

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Kathryn I. Blankenship, respectfully prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Ninth Circuit in this case.

OPINION BELOW

On May 14, 1999 the United States Court of Appeals for the Ninth Circuit affirmed the dismissal of petitioner's suit against District Court Judge Alan A. McDonald and District Court Clerk James Larsen. *Blankenship v. McDonald*, 176 F.3d 1192 (9th Cir. 1999). The opinion appears as Appendix A to this petition.

JURISDICTION

Petitioner's petition for rehearing was denied by the Court of Appeals on July 22, 1999. A copy of this order appears as Appendix B to this petition. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

42 U.S.C. Section 1985 provides in pertinent part:

> If two or more persons in any State or territory conspire to deter by force, intimidation, or threat, *any party or witness* in any court of the United States from attending such court, or from

> testifying truthfully, or *to injure such party or witness* in his person or property *on account of his having so attended or testified*, or to influence the verdict, presentment or indictment of any grand or petit juror in any such court, or to injure such juror in his person or property on account of any verdict, presentment, or indictment lawfully assented to by him, or of his being or having been such juror; . . .
>
> [I]n any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, *whereby another is injured* in his person or property, or deprived of having and exercising any privilege of a citizen of the United States, *the party so injured or deprived may have an action* for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

(Italics added).

The First Amendment to the United States Constitution provides in pertinent part:

> Congress shall make no law . . . abridging the freedom of speech . . . .

STATEMENT OF THE CASE

Kathryn I. Blankenship filed suit against defendants, District Court Judge Alan A. McDonald and Court Clerk James R. Larsen in their individual capacities. Her suit was dismissed for failure to state a claim upon which relief could be granted. *Blankenship*, 176 F.3d at 1195.

Accordingly, the allegations of her complaint were considered true by the Court of Appeals. *Id.* at 1194.

Blankenship was appointed as a court reporter for the United States District Court for the Eastern District of Washington in 1985. *Id.* From 1985 to 1990 she worked in Spokane, Washington, and then in 1990 she was transferred to Yakima, Washington where she worked as the official court reporter for Judge McDonald. *Id.* James Larsen was the Clerk of the District Court, and he supervised the court reporters in Spokane and Yakima. *Id.* Larsen is also the Equal Employment Opportunity ("EEO") Coordinator for the Court.

On July 24, 1994 an EEO hearing was held before the Chief Judge of the District Court to consider the complaint of deputy clerk Christie Mearns. (ER 5-6). Mearns alleged gender discrimination in her employment as a deputy clerk at the Yakima federal courthouse. (ER 5-6). Blankenship was subpoenaed by Mearns' attorney to testify at the Mearns' grievance hearing. *Blankenship*, at 1194. The Chief Judge of the District Court presided at the Mearns EEO hearing.

Blankenship expressed her fear that she would be fired if she were required to testify; however, after she was assured by the Chief Judge that her testimony would be confidential, and that she would not be retaliated against for testifying, she did so. (ER 6). In her sworn testimony she attested to facts in support of Mearns' claim of discrimination. She testified to Judge McDonald's conduct "which included abuse of personnel rules, use of court facilities for private business, regular

and excessive profanity, and sexist and racist jokes and comments." *Blankenship*, at 1194.

She also disclosed facts concerning numerous acts of misconduct by Judge McDonald. (ER 7-9); *Blankenship*, at 1194. She testified that Judge McDonald had required her to certify under oath that her official court transcripts were true and correct verbatim transcripts even though the judge had changed and edited them, and that he would not allow her to certify them "as amended." (ER 7); *Blankenship*, at 1194. She further testified that Judge McDonald required her to generate false and unauthorized reimbursement requests; to conceal information from a government audit; to notarize false signatures and to make false signatures and to participate in the creation of false documents; and to do personal errands and private business work for him while at the courthouse and elsewhere on federal employment time. (ER 8).

Following the Mearns hearing, Clerk Larsen, who was present for Blankenship's testimony, was observed talking with Judge McDonald. *Blankenship*, at 1194. The next working day when Blankenship first saw Judge McDonald he threatened and intimidated her in a physically hostile and aggressive manner, stating that nothing would stand between him and senior status, and accused her of having "aired the court's dirty laundry." *Id.* (ER 9-10). He told her she would no longer be able to keep her job, and he reminded her of what had happened to attorney Jay Sandlin who had crossed him. (ER 10). *See United States District Court v. Sandlin*, 12 F.3d 861 (9th Cir. 1993).

Thereafter Clerk Larsen told Blankenship that she had betrayed and been disloyal to Judge McDonald, and that she could no longer work at the Yakima courthouse. (ER 10-11). He told her she had three options: (1) to take a voluntary transfer to Spokane to be part of a pool of court reporters; (2) to take permanent medical disability; or (3) to be terminated for poor performance due to a delay in filing a recent transcript. *Blankenship*, at 1194. Blankenship refused to elect any of these options. *Id.* After Blankenship refused to accept a "voluntary" transfer to Spokane, she received a poor performance review in the mail on November 22, 1994. (ER 12-13); *Blankenship*, at 1194. In her previous ten years of service as an Official Court Reporter Blankenship had never received a written performance review. (ER 12).

Larsen informed Blankenship that effective February 1, 1995 she was to be demoted and transferred to the Spokane federal courthouse where she would never be seen by Judge McDonald. *Blankenship*, at 1194. Blankenship refused to be transferred to Spokane. *Id.* On February 1, 1995 Larsen informed Blankenship that he was recommending that she be fired. *Id.* Blankenship responded in writing that the stated grounds for her termination were pretextual. *Id.* By letter dated February 13, 1995 Blankenship was informed that effective March 3, 1995 she was fired. *Id.* at 1194-95. The order firing her was signed by the four active district court judges, including Judge McDonald and the Chief Judge who had presided over the Mearns EEO hearing. *Id.* at 1195; (ER 14).

In her complaint Blankenship alleged a claim under 42 U.S.C. Section 1985(2). That statute provides that a

person who testifies "in any court of the United States" has a cause of action against persons "who conspire . . . to injure such party *or witness* in his person or property on account of his having so attended or testified . . . ." The Court of Appeals affirmed the dismissal of this claim holding that nonparty witnesses do not have a cause of action under this statute. *Blankenship*, at 1196. Holding that only litigants have a cause of action under this statute, the Court concluded that "[b]ecause Blankenship was not a party to the EEO proceeding, she can show no injury under Section 1985(2)." *Id.* The Court of Appeals relied upon its earlier decision in *David v. United States*, 820 F.2d 1038, 1043 (9th Cir. 1987), which held that nonparty witnesses have no cause of action.

Blankenship also brought a *Bivens*[1] claim against McDonald and Larsen, contending that they had conspired to punish her for testifying truthfully, thereby violating her First Amendment right to freedom of speech. The District Court dismissed Blankenship's *Bivens* claim on the ground that Congress had precluded judicial branch employees from bringing such claims. Under the Civil Service Reform Act ("CSRA") court reporters are classified as "excepted service" employees. (ER 202). "Excepted service" employees of the judicial branch have no statutory right to administrative or judicial review of adverse personnel decisions. However, the District Court noted that judicial branch employees can

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[1] A "*Bivens* action" is the commonly used phrase which describes a judicially created remedy for unconstitutional conduct by federal officials. *See Bivens v. Six Unknown Agents*, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971).

file EEO complaints under the local District Court's EEO plan. "The Eastern District's EEO Plan allows an employee to bring a discrimination complaint if the employee has been retaliated against for 'serv[ing] as a . . . witness . . . in connection with a complaint." (ER 204). Such EEO complaints are initially handled by the EEO Coordinator (in this case defendant Larsen), and if the complainant objects to the Coordinator's recommended disposition of the complaint, a review hearing may be held before the Chief Judge of the District Court. (ER 204). An employee who prevails on an EEO discrimination complaint may not recover damages. However, the District Court noted that "the Back Pay Act allows judicial employees to receive back pay for adverse personnel actions determined by the 'appropriate authority' to have been 'unjustified or unwarranted.' " (ER 204). The District Court concluded that Congress intended for judicial branch employees to have no other remedy for retaliation for having testified beyond the remedy afforded by the combination of the EEO Plan for the local District Court and the Back Pay Act. (ER 206).

> I recognize that the remedies available to plaintiff are incomplete compared to those that would be available in a *Bivens* action. Under the EEO Plan, the Chief Judge's decision on a discrimination complaint apears to be final, and the EEO coordinator's decision is not necessarily reviewable at a formal hearing. [Citation]. Nevertheless, because Congress's failure to provide more complete remedies was not inadvertent, no *Bivens* action is available to plaintiff.

(ER 206).

The Ninth Circuit affirmed the District Court's dismissal. Without describing or indicating what Blankenship's nonjudicial remedies were, the Court of Appeals simply stated that Blankenship had some "incomplete" remedy – presumably the combination of the Back Pay Act and the EEO grievance procedure that the District Court premised its ruling upon – and that "the lack of more complete remedies was not inadvertent." *Blankenship*, 176 F.3d at 1195. Finding that Congress' decision not to afford "excepted service" judicial branch employees the right to administrative or judicial review of adverse personnel decisions remedies was "not inadvertent," the Court of Appeals concluded "that the CSRA precludes a *Bivens* remedy in this case." *Id.*

Blankenship contended that even assuming Congress intended to preclude any *Bivens* action, that it would be unconstitutional to leave judicial branch employees without any remedy whatsoever for the deliberate violation of their constitutional rights. The Court of Appeals did not address this argument directly, and by its silence, impliedly rejected it.

REASONS FOR GRANTING THE WRIT

A. THE DECISION BELOW CONFLICTS WITH TWO DECISIONS OF THE TENTH CIRCUIT.

The Ninth Circuit's decision that a nonparty witness does not have a cause of action under 42 U.S.C. § 1985 is in direct conflict with two decisions of the Tenth Circuit, *Brever v. Rockwell International Corp.*, 40 F.3d 1119 (10th Cir. 1994) and *Langley v. Adams County, Colorado*, 987 F.2d

1473 (10th Cir. 1993).[2] It is also in conflict with a thoughtful District Court decision in *Gerakis v. Champagne*, 913 F.Supp. 646 (D.Mass. 1996), and with District Court decisions from the Third and Fifth Circuits.[3] These courts have held that a nonparty witness does have a cause of action under 42 U.S.C. § 1985. On the other hand the Seventh Circuit has adopted the position taken by the Ninth Circuit. *Rylewicz v. Beaton Services*, 888 F.2d 1175, 1180 (7th Cir. 1989). The issue was recently noted by this Court, but the question was left to the lower courts to resolve on remand. *Haddle v. Garrison*, 525 U.S. 121, 119 S.Ct. 489, 491, n.3, 142 L.Ed.2d 502 (1998).[4]

The text of 42 U.S.C. § 1985 is divided into three subsections. The first deals with conspiracies to prevent a federal officer from performing his or her duties. The second section deals with conspiracies to obstruct justice by intimidating a party, witness, or juror. The third section deals with conspiracies to deprive persons of the equal protection of the laws, or of equal privileges and

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[2] Other Circuit Courts have stated in dicta that the statute does apply to nonparty witnesses. *See Kimble v. McDuffy*, 648 F.2d 340, 348 (5th Cir. 1981) (Section 1985(2) "was intended to protect against direct violations of a party *or witness's right* to attend or testify in federal court.")

[3] *Hoopes v. Nacrelli*, 512 F.Supp. 363, 368 (E.D.Pa. 1981); *Kelly v. Foreman*, 384 F.Supp. 1352, 1353 (S.D.Tex. 1974); *Crawford v. City of Houston*, 386 F.Supp. 187, 192 (S.D.Tex. 1974).

[4] "We express no opinion regarding respondents' argument that intimidation claims under Section 1985(2) are limited to conduct involving force or threat of force, or their argument that only litigants and not witnesses, may bring Section 1985(2) claims. We leave those issues for the courts below to resolve on remand."

immunities under the law. Blankenship sought to bring suit under subsection (2) which explicitly provides, in two separate places, that it applies to conspiracies directed against "any party or witness" who has attended or testified in any court of the United States. The Ninth Circuit, however, relying on the phrase "the party so injured or deprived" contained in subsection (3), has construed the statute as conferring a cause of action only upon a witness who is also a party to the matter being heard in the court.

This construction flies in the face of the statutory text. First, the statute refers to "the party so injured or deprived"; *not* to "the party to the suit." Second, the remedial section encompasses remedies for several types of conspiracies that have nothing at all to do with litigation or court cases, such as conspiracies to interfere with voting. *See, e.g., Paynes v. Lee*, 377 F.2d 61 (1967) (African-American man had § 1985 cause of action against white man for interfering with his attempt to register to vote notwithstanding fact that plaintiff was neither a litigant nor a witness in any case). Third, subsection (2) explicitly refers to "any party *or* witness in any court of the United States," instead of referring to any "party witness" or to "any party who is a witness." Fourth, the Ninth Circuit's construction contradicts the directive of this Court that Reconstruction civil rights acts are to be construed broadly. *Griffin v. Breckenridge*, 403 U.S. 88, 97, 91 S.Ct. 1790, 29 L.Ed.2d 338 (1971).

In rejecting the approach taken by the Ninth Circuit, the Tenth Circuit held that it is clear from statutory language that nonparty witnesses are provided a remedy by the statute:

> Although defendants contend that plaintiff does not have standing to assert a Section 1985(2) claim because she was not a party in the Sweeny case, we do not agree. We have noted that Section 1985(2) creates four distinct causes of action, one of which is for conspiring "to injure such party or witness [who has testified in any court of the United States] in his person or property on account of his having so attended or testified.

Langley v. Adams County, 987 F.2d at 1481. Later in *Brever v. Rockwell International*, 40 F.3d at 1125, n.7 the Tenth Circuit reaffirmed its interpretation of the statute as including nonparty witnesses:

> Defendants suggest that the remedial portion of the statute located in section 1985(2) limits standing to parties only. The language relied on by defendants provides that "in any case of conspiracy set forth in [section 1985] . . . the party so injured or deprived may have an action for the recovery of damages . . . against any one or more of the conspirators." 42 U.S.C. § 1985(3) (emphasis added). Unlike defendants, we do not read the word "party" so literally as to mean "named party to an action," especially where the preceding portion of the same statute specifically identifies witnesses as protected persons. Moreover, defendants' suggested limitation on standing would effectively emasculate section 1985(2) in the context of this case. Here, we have a federal grand jury proceeding where the only "party," according to defendants' interpretation of the statute, would be the United States. We disagree with such a narrow reading, and *to the extent that defendants cite cases to the contrary we hold otherwise.*

(Italics added).

B. THE DECISION BELOW CONFLICTS WITH THIS COURT'S DECISION IN *KUSH v. RUTLEDGE*.

The Ninth Circuit's construction of the statute is also inconsistent with this Court's decision in *Kush v. Rutledge*, 460 U.S. 719, 103 S.Ct. 1483, 75 L.Ed.2d 413 (1983), and with the statutory history of § 1985. In *Kush* this Court traced the legislative history of the statute, noting that it "was originally enacted as § 2 of the Civil Rights Act of 1871, 17 Stat. 13." *Id.* at 724. Three years later the statute was recodified. "When Congress passed legislation in 1874 to consolidate and collect all federal statutes and laws in the Revised Statutes, 18 Stat. 113, it expressed no intention to change the meaning of the laws, although minor changes in language were made to accommodate the consolidation." *Id.* at 724, n.6. As originally enacted in the Ku Klux Klan Act of 1871, the remedial portion of the statute conferred the right to bring suit for damages upon "the person so injured or deprived" by the wrongful conduct of the conspirators. 17 Stat. 13 (1871). Under *Kush* the changing of the word "person" to "party" was done "with no intention to change the meaning of the laws." *Id.* Therefore, the phrase "the party so injured or deprived" should be construed as meaning the same thing as the phrase "the person so injured or deprived." Since nonparty witnesses are "persons," under *Kush* they do have a cause of action under Section 1985 whenever they are "injured" for having attended or testified in a court of the United States.[5]

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[5] Blankenship also has standing to sue under Section 1985(2) for deprivation of her First Amendment right to

Finally, although this Court's decision in *Kush* did not directly address the issue of whether nonparty witnesses could bring an action under § 1985, the language at the end of the opinion regarding the purpose of the statute indicates that this Court assumed that they could:

> Protection of the processes of the federal courts was an essential component of Congress' solution to disorder and anarchy in the southern States. Neither proponents or opponents of the bill had any doubt that the Constitution gave Congress the power to prohibit intimidation of parties, *witnesses*, and jurors in federal courts.

Kush, 460 U.S. at 727 (italics added).

C. THE CASE PRESENTS AN IMPORTANT ISSUE OF FEDERAL LAW THAT SHOULD BE SETTLED BY THIS COURT.

Whether nonparty witnesses who are injured on account of their having testified in a federal court have a cause of action under 42 U.S.C. § 1985 is an important federal question. The statute was originally enacted to prevent interference with the administration of justice in federal courts. At present in the Seventh and Ninth Circuits, nonparty witnesses can be harmed in retaliation for

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freedom of speech since the statute also provides a remedy for conspiracies to injure "any person" on account of their "having and exercising any right or privilege of a citizen of the United States." It is well settled that the "First Amendment protects the right to testify truthfully." *Melton v. City of Oklahoma City*, 879 F.2d 706, 714 (10th Cir. 1989) (*Melton I*), *overruled in part on rehearing en banc*, 928 F.2d 920 (10th Cir.) (*Melton II*), *cert. denied*, 12 S.Ct. 296 (1991).

their having obeyed a subpoena to appear and testify in a federal court, and they will have no remedy for their injury. But in the Tenth Circuit they will have a remedy. In other Circuits, the issue is unresolved, and the District Courts are without Circuit Court authority to instruct them as to how to resolve the issue. To date all published District Court decisions on the issue have rejected the Ninth Circuit's position.

This Court granted certiorari in *Kush* in order to resolve similar issues of statutory construction regarding Section 1985. 460 U.S. at 723. Because this case meets the criteria of Supreme Court Rule 10(a) and 10(c), this Court should grant certiorari in this case to resolve this important issue of statutory construction.

D. THE NINTH CIRCUIT'S HOLDING THAT JUDICIAL BRANCH EMPLOYEES MAY NOT BRING *BIVENS* ACTIONS FOR UNCONSTITUTIONAL JOB DISCRIMINATION CONFLICTS WITH DECISIONS OF THE SIXTH AND EIGHTH CIRCUITS.

The Ninth Circuit's decision that Blankenship may not bring a *Bivens* action because she has a "less than complete" remedy in the form of an EEO grievance combined with the Back Pay Act, is in direct conflict with the Eighth Circuit's decision in *Duffy v. Wolle*, 123 F.3d 1026 (8th Cir. 1997). *Duffy* specifically rejected the contention that Congress' delegation of power to the Judicial Conference, and the Judicial Conference's adoption of EEO plans on a Circuit by Circuit basis, could be read as demonstrating a Congressional intent to limit judicial employees to whatever remedies were provided for in

those EEO plans. Finding that such a delegation of legislative power would "almost certainly [be] a violation of the separation of powers doctrine," the Eighth Circuit *rejected* the argument that an EEO plan providing for administrative remedies for discrimination or retaliation claims was sufficient proof that Congress intended to preclude the bringing of *Bivens* actions by a judicial branch employee. *Duffy*, 123 F.3d at 1034-1035. A District Court in California has also rejected the same argument. *Garcia v. Williams*, 704 F.Supp. 985, 990 (N.D.Cal. 1988).[6]

The Sixth Circuit, like the Eighth, has also permitted judicial branch employees to bring *Bivens* actions. In *Guercio v. Brody*, 814 F.2d 1115 (6th Cir. 1987) the Court reversed a District Court decision which had dismissed a *Bivens* action brought by a bankruptcy judge's personal secretary against the Honorable George Brody, Judge of the United States Bankruptcy Court. Guercio's *Bivens* action, like Blankenship's, was also based on the contention that she had been retaliated against in violation of her First Amendment free speech rights. Guercio, like Blankenship, contended that she had "played a central role in exposing corruption" in the federal court. *Guercio*, 814 F.2d at 1116.

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[6] "While Congress did create the Judicial Conference, which in turn mandated that each judicial district implement an EEO plan, this activity is not remotely comparable to the legislative activity apparent in *Bush* and *Schweiker*. Consequently I do not find that a *Bivens* action should be precluded on the basis that Congress has given careful attention to judiciary personnel or on the basis that Congress has provided what it considers adequate remedies."

E. THE DECISION BELOW CONFLICTS WITH THIS COURT'S DECISION IN *DAVIS v. PASSMAN* THAT FAILURE TO INCLUDE A CLASS OF EMPLOYEES WITHIN THE SCOPE OF A STATUTE DOES NOT DEMONSTRATE THAT CONGRESS INTENDED TO PRECLUDE A *BIVENS* ACTION.

If the Eighth Circuit is correct in holding that Congress did not intend for EEO grievance plan procedures to preclude *Bivens* remedies, then the only remaining argument in support of the conclusion that Congress intended to preclude judicial branch employees from bringing *Bivens* actions rests on the Civil Service Reform Act. Relying on the Eleventh Circuit's decision in *Lee v. Hughes*, 145 F.3d 1272 (11th Cir. 1998), defendants McDonald and Larsen contended that Congress' failure to give judicial branch employees any statutory right to judicial review of adverse personnel decisions under the CSRA demonstrates that Congress intended that such employees should not be able to bring any *Bivens* action either.

The extent to which the Ninth Circuit relied upon this argument is unclear. On the one hand, the Ninth Circuit cited *Hughes* in support of the proposition that Congress' action "in providing certain remedies and denying others to judicial employees" was not inadvertent. *Blankenship*, 176 F.3d at 1195, citing to *Hughes*, 145 F.3d at 1275. But the *Hughes* decision of the Eleventh Circuit does not recognize the existence of any Congressionally provided remedies for judicial branch employees. On the contrary, the Eleventh Circuit candidly acknowledged that by excluding judicial branch

employees from the class of employees entitled to obtain administrative or judicial review of adverse personnel actions, Congress had left them with no remedies whatsoever. The Eleventh Circuit expressly stated that it found it "troubling" that Congress left judicial branch employees with absolutely no remedy for unconstitutional job discrimination.[7] Thus it makes no sense for the Ninth Circuit to cite *Hughes* as support for the proposition that "less than complete" remedies were intentionally provided, when *Hughes* expressly holds that Congress provided no remedies at all. Although the District Court in this case considered the combination of the EEO Plan and the Back Pay Act to be an adequate albeit "less than complete" remedy for judicial branch employees, the Eleventh Circuit specifically eschewed this rationale. The *Hughes* Court recognized that the Eighth Circuit had rejected the EEO Plan/Back Pay Act theory in *Duffy v. Wolle, supra,* and declined to address this theory at all. *Hughes,* 145 F.3d at 1276, n.4. Instead, the Eleventh Circuit expressly held that Congress intended for judicial branch employees to have no remedy at all, and that Congress' intent was therefore to also preclude *Bivens* actions as well. Thus the Ninth Circuit's rationale conflicts with the Eleventh Circuit's rationale, as

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[7] *Hughes* explicitly recognizes that the CSRA does not provide judicial branch employees with judicial or administrative review of adverse personnel decisions. *Hughes,* 145 F.3d at 1275. The Eleventh Circuit noted that the case before "is troubling because plaintiff was not afforded a congressionally enacted judicial or administrative procedure through which to vindicate the alleged constitutional wrong." *Id.* at 1276.

well as with the rationale and the result reached by the Eighth Circuit in *Duffy v. Wolle, supra.*

Moreover, even assuming that the Ninth Circuit meant to adopt the Eleventh Circuit's contention that omission of any statutory remedy for a class of employees is to be read as indicative of a Congressional intent to preclude a *Bivens* action, that conclusion is directly contrary to this Court's decision in *Davis v. Passman,* 442 U.S. 228, 99 S.Ct. 2264, 60 L.Ed.2d 846 (1979). It was undisputed in *Davis* that Congress left Congressional employees with absolutely no statutory remedies against gender discrimination. And yet this Court rejected the contention that this meant that Congress intended to preclude *Bivens* actions by Congressional employees against Congressmen:

> [T]here is in this case "no explicit congressional declaration that persons" in petitioner's position injured by unconstitutional federal employment discrimination "may not recover damages from" those responsible for the injury. *Bivens, supra,* 403 U.S., at 397, 91 S.Ct., at 2005 . . . When § 717 was added to Title VII to protect federal employees from discrimination, it failed to extend this protection to congressional employees such as petitioner who are not in the competitive service. [Footnote omitted]. There is no evidence, however, that Congress meant § 717 to foreclose alternative remedies to those not covered by the statute. Such silence is far from "the clearly discernible will of Congress" perceived by the Court of Appeals . . . [W]e do not interpret § 717 to foreclose the judicial remedies of those expressly unprotected by the

> statute. On the contrary, § 717 leaves undisturbed whatever remedies petitioner might otherwise possess.

Davis, 442 U.S. at 246-247.

F. THE DECISION BELOW CONFLICTS WITH THIS COURT'S DECISIONS IN *DAVIS v. PASSMAN* AND *BIVENS v. SIX UNKNOWN AGENTS* THAT LITIGANTS WHO ALLEGE THAT THEIR CONSTITUTIONAL RIGHTS HAVE BEEN VIOLATED AND WHO HAVE NO EFFECTIVE MEANS OTHER THAN THE JUDICIARY TO ENFORCE THESE RIGHTS, MUST BE ABLE TO ENFORCE THESE RIGHTS THROUGH A *BIVENS* ACTION.

In *Davis* this Court held that in the absence of a textually demonstrable commitment of an issue to another branch of government, it is presumed that justiciable constitutional rights are to be enforced through the courts. *Id.* at 243. "[U]nless such rights are to become merely precatory, the class of litigants who allege that their own constitutional rights have been violated, and who at the same time have no effective means other than the judiciary to enforce these rights, must be able to invoke the existing jurisdiction of the courts for the protection of their justiciable constitutional rights." *Id.* at 242.

In subsequent cases this Court has contrasted the position of those that have some significant remedies that may afford less than complete redress for their injuries, with those that have no statutory remedies whatsoever. For example, *Bush v. Lucas*, 462 U.S. 367, 103 S.Ct. 2404, 76 L.Ed.2d 648 (1983) involved an executive branch

employee who exercised his statutory right to seek administrative review of his demotion. The employee won reinstatement and an award of $30,000 in back pay from the Civil Service Commission Review Board. And in *United States v. Fausto*, 484 U.S. 439, 108 S.Ct. 668, 98 L.Ed.2d 830 (1988) a Fish and Wildlife Service employee filed a grievance challenging his termination before an independent grievance examiner, and won reinstatement and an award of back pay. Thus both Fausto and Bush had significant meaningful statutory remedies, and both were able to use them to challenge the adverse employment decisions made against them.

The plaintiffs in *Davis* and *Bivens*, however, had no statutory remedies at all. Their only means of obtaining a remedy was to recognize an implied damages remedy directly from the Constitution itself. As this Court noted in *Bush*, "For Davis, as for Bivens, 'it is damages or nothing.' " *Bush*, 462 U.S. at 245, quoting *Bivens*, 403 U.S. at 410. In this respect, Blankenship is in the same position as the plaintiffs in *Davis* and in *Bivens*. As a judicial branch employee Blankenship has no statutory right under the CSRA to obtain review of an adverse personnel action.[8] The ability to file an EEO grievance is hardly an

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[8] In 5 U.S.C. § 2302 the CSRA contains wide ranging prohibitions against several "prohibited personnel practices." But the Act is limited to Executive branch employees. A "personnel action" is defined as an action taken "with respect to an employee in, or applicant for, a covered position *in an agency* . . . ." 5 U.S.C. § 2302(a)(2)(A). And although the term "covered position" does include a person with "a position in the excepted service," the Act states that the term " 'agency' means *an Executive agency and the Government Printing Office* . . . ." 5

adequate remedy in a case like this one where the EEO complaint will be handled by the Clerk who conspired to demote her and then recommended that she be fired, the Chief Judge who promised no retaliation due to her testimony but who signed the order firing her, and ultimately by the district court *en banc*, including the Chief Judge and Judge McDonald, in upholding her termination. Thus Blankenship's only possible constitutionally adequate remedy is a *Bivens* action. The Ninth Circuit's decision that she cannot bring a *Bivens* action thus conflicts with this Court's decisions in *Davis* and *Bivens*.

G. THIS CASE PRESENTS THE CONSTITUTIONAL ISSUE WHICH THIS COURT RESERVED IN *BUSH v. LUCAS*: "DOES THE CONSTITUTION ITSELF REQUIRE A JUDICIALLY FASHIONED DAMAGES REMEDY IN THE ABSENCE OF ANY OTHER REMEDY TO VINDICATE THE UNDERLYING RIGHT?"

The decision below presents the constitutional issue which this Court reserved in *Bush*. There this Court observed that since the plaintiff was afforded some meaningful remedies under the CSRA, "[w]e need not reach the question whether the Constitution itself requires a judicially fashioned damages remedy in the absence of any other remedy to vindicate the underlying right." *Bush*, 462 U.S. at 378, n.14.

U.S.C. § 2302(a)(2)(C). Thus the CSRA affords employees of the Judicial Branch no remedies at all against adverse personnel actions.

In the present case the Ninth Circuit's citation to *Hughes* appears to endorse the Eleventh Circuit's holding that by enacting the CSRA Congress intentionally deprived judicial branch employees of any means of remedying any violation of any of their constitutional rights, and deliberately meant to preclude them from bringing any *Bivens* action. Even assuming that were true, the question would remain whether it is constitutional for Congress to preclude a *Bivens* action when it fails to provide any other meaningful remedy. In *Bush* this Court noted, "The existing civil service remedies for a demotion in retaliation for protected speech are clearly constitutionally adequate." *Bush*, 462 U.S. at 378, n.14. The present case raises the issue of whether a judicial branch employee has a "constitutionally adequate" remedy for being fired for testifying truthfully at another employee's EEO grievance hearing, when her only conceivable remedy is to present an EEO grievance to one of the federal judges who signed the order firing her, and who personally reassured her before she testified that her testimony would remain confidential and that she need not fear that her testimony would lead to retaliation.[9]

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[9] It is well settled that one of the minimum requirements of procedural due process is an impartial decisionmaker. *Withrow v. Larkin*, 421 U.S. 35, 47, 95 S.Ct. 1456, 43 L.Ed.2d 712 (1975). In the present case, had Blankenship filed an EEO grievance regarding her termination, her grievance would have been processed by the Clerk of the Court, who is in her case one of the defendants in this case, and it would have been heard by the Chief Judge of the District Court, who signed the order which fired her. Thus it cannot plausibly be argued that the availability of an EEO grievance procedure constituted a "constitutionally adequate" remedy for the violation of Blankenship's First Amendment rights.

In *Bush*, Justices Marshall and Blackmun observed, in their concurring opinion, "there is nothing in today's decision to foreclose a federal employee from pursuing a Bivens remedy where his injury is not attributable to personnel actions which may be remedied under the federal statutory scheme." *Bush*, at 391 (Marshall, J., concurring). They emphasized that "a different case would be presented if Congress had not created a remedy that was specifically designed to provide full compensation to civil service employees who are discharged or disciplined in violation of their First Amendment rights." *Id.* at 390. But the present case presents exactly that scenario, because under the CSRA judicial branch employees do not have any remedy against discharge in violation of their First Amendment rights.

In *Bush* this Court noted, "The question is not what remedy the court should provide for a violation that would otherwise go unredressed." *Bush*, 462 U.S. at 388. But in the present case that is the question. The violation of Blankenship's First Amendment rights will go unredressed unless this Court holds that the Ninth Circuit erred in holding that Congress deliberately precluded all judicial branch employees from bringing *Bivens* actions.

State government employees, including state judicial branch employees, can bring damages actions for the deprivation of their constitutional rights under 42 U.S.C. Section 1983. *See, e.g., Forrester v. White*, 484 U.S. 219, 108 S.Ct. 538, 98 L.Ed.2d 555 (1988). Federal employees of the executive branch can obtain meaningful redress for unconstitutional job discrimination under the Civil Service Reform Act. Congressional employees can bring *Bivens* actions. But according to the Ninth Circuit,

employees of the federal judiciary have no remedy at all. There is no plausible justification for isolating employees of the federal judiciary as the only class of government employees in the country who cannot vindicate the violation of the First Amendment right to speak truthfully without being fired for having done so.

CONCLUSION

For the reasons stated above, this petition for a writ of certiorari to review the decision of the United States Court of Appeals for the Ninth Circuit should be granted.

DATED this 8th day of October 1999.

JAMES E. LOBSENZ
Counsel of Record

VICTORIA VREELAND
Attorneys for Petitioner

APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Kathryn I. BLANKENSHIP, Plaintiff-Appellant,

v.

The Honorable Alan A. McDONALD, United States District Court Judge, Eastern District of Washington, personally and the marital community composed of Alan A. McDonald and Ruby K. McDonald; James R. Larsen, Clerk, United States District Court, Eastern District Of Washington, personally, and the marital community composed of James R. Larsen and L. Dianne Emmons, Defendants-Appellees.

No. 97-35898.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted Dec. 10, 1998.

Filed May 14, 1999.

Appeal from the United States District Court for the Eastern District of Washington; Owen M. Panner, District Judge, Presiding. D.C. No. CV-97-03019-OMP.

Before: REAVLEY,[1] LEAVY and McKEOWN, Circuit Judges.

LEAVY, Circuit Judge:

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[1] The Honorable Thomas M. Reavley, Senior United States Circuit Judge for the United States Court of Appeals, Fifth Circuit, sitting by designation.

This case requires us to decide whether a federal court reporter who has no effective remedies under the Civil Service Reform Act ("CSRA)[2] has an action for money damages, commonly called a *Bivens* action,[3] for alleged constitutional violations in the workplace. The plaintiff, Kathryn Blankenship, appeals the district court's judgment of dismissal. We have jurisdiction pursuant to 28 U.S.C. Section 1291 and we affirm.

I.

Blankenship filed this action against the defendants, District Court Judge Alan A. McDonald and Court Clerk James Larsen, in their individual capacities. The allegations in the complaint are considered true and for purposes of the motion to dismiss and may be summarized as follows:

Blankenship was appointed in 1985 as a court reporter for the United States District Court for the Eastern District of Washington. From 1985 to 1990, she worked in Spokane, Washington, and in 1990, she was transferred to Yakima, Washington in the same district. She worked throughout her employment as the official court reporter for Judge McDonald. James Larsen supervised the court reporters in Spokane and Yakima.

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[2] The CSRA is codified and amended in various sections of Title 5, United States Code.

[3] A "*Bivens*" action is the commonly used phrase describing a judicially created remedy for unconstitutional conduct by federal officials. This constitutional tort theory was set out in *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971).

In July 1994, Blankenship was subpoenaed to testify in a former employee's hearing pursuant to a complaint filed under the court's Equal Employment Opportunity ("EEO") plan. Blankenship testified about events and conduct in the Yakima courthouse, particularly involving the conduct of Judge McDonald's in-court clerk, which included the abuse of personnel rules, use of court facilities for private business, regular and excessive profanity, and sexist and racist jokes and comments. She also testified that Judge McDonald reviewed her official transcripts prior to filing, edited and deleted words, required her to change the reports of proceedings, and would not allow her to certify the reports "as amended." She testified that Judge McDonald and his in-court clerk often passed notes which included comments about a litigant, witness, or attorney that were disrespectful and rude.

Immediately following the hearing, James Larsen was observed talking with Judge McDonald outside the courthouse. The next working day, Judge McDonald confronted Blankenship and demanded to know why she had "aired the court's dirty laundry."

James Larsen met Blankenship outside the courthouse and told her that she had three options: (1) to take a voluntary transfer to Spokane to be part of a pool of court reporters; (2) to take permanent medical disability; or (3) to be terminated for poor performance due to delay in filing a recent transcript. Blankenship exercised none of these options. James Larsen then scheduled a performance review for November 10, 1994. Blankenship did not attend the review and sent a letter to Larsen protesting the review, stating that she should not be punished for bringing judicial improprieties to the court's attention.

In November 1994, Larsen sent a written "performance report" to Blankenship by mail, principally citing Blankenship's failure to meet certain filing deadlines. In December 1994, Larsen wrote Blankenship that she would be transferred to Spokane effective February 1, 1995. Blankenship refused to be transferred to Spokane. On February 1, 1995, Larsen wrote to Blankenship that he planned to recommend her termination. Blankenship responded in writing that the stated reasons for the proposed termination were pretextual. By letter dated February 13, 1995, signed by the four ten-active district court judges, Blankenship was officially terminated by the court effective March 3, 1995.

In her complaint, filed in February 1997, Blankenship alleged that defendants violated her first and fifth amendment rights, and that these violations caused her injuries for which she should receive money damages. The district court dismissed the complaint for failure to state a claim upon which relief could be granted.

II.

Blankenship, as an appointed judicial employee, is a member of the "excepted service" under the CSRA.[4] Blankenship argues that because she has no administrative or

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[4] "Civil service" consists of all appointive positions, including those in the judicial branch, 5 U.S.C. Section 2101; court reporters are appointed under 28 U.S.C. Section 753(a); "civil service" includes those in "excepted service" under 5 U.S.C. Section 2103, which includes everyone who is not in the two other categories of civil service.

judicial remedies under the CSRA as a member of the excepted service, she is entitled to assert a *Bivens* claim.

In *Bivens*, the Supreme Court held that a plaintiff could state a claim and recover money damages against federal officials for constitutional violations where there are no "special factors counseling hesitation in the absence of affirmative action by Congress." 403 U.S. at 396-97, 91 S.Ct. 1999. "When the design of a Government program suggests that Congress has provided what it considers adequate remedial mechanisms for constitutional violations that may occur in the course of its administration," the Supreme Court has not created additional *Bivens* remedies. *Schweiker v. Chilicky*, 487 U.S. 412, 423, 108 S.Ct. 2460, 101 L.Ed.2d 370 (1988). Accordingly, we have declined to create a *Bivens* remedy if there are "indications that congressional action has not been inadvertent." *Moore v. Glickman*, 113 F.3d 988, 993 (9th Cir. 1997) (quoting *Chilicky*, 487 U.S. at 423, 108 S.Ct. 2460).

The CSRA contains an "elaborate remedial system that has been constructed step by step, with careful attention to conflicting policy considerations . . . " *Bush v. Lucas*, 462 U.S. 367, 388, 103 S.Ct. 2404, 76 L.Ed.2d 648 (1983). In *Saul v. United States*, 928 F.2d 829, 840 (9th Cir. 1991), we stated:

> "The CSRA's comprehensive remedial provisions convince us that there was no inadvertence in omitting a damages remedy against supervisors whose work-related actions allegedly violate a subordinate's constitutional rights. In the area of federal employment, congress is better equipped than we to strike an

> appropriate balance between employees' interests in remedying constitutional violations and the interests of the government and the public in maintaining the efficiency, morale and discipline of the federal workforce."

Because congressional action has not been inadvertent in providing certain remedies and denying others to judicial employees, we hold that the CSRA precludes a *Bivens* remedy in this case. Accord *Lee v. Hughes*, 145 F.3d 1272, 1275 (11th Cir. 1998). Congress has given judicial employees certain employment benefits and remedies, such as back pay, severance pay, family and medical leave, and health and retirement benefits. Congress has withheld other benefits and remedies, such as review of adverse personnel decisions. This demonstrates that the lack of more complete remedies was not inadvertent. *See Moore*, 113 F.3d at 992; *Kotarski v. Cooper*, 866 F.2d 311, 312 (9th Cir. 1989).

III.

Blankenship's complaint also alleged state tort claims for intentional infliction of emotional distress. Blankenship's state claims are preempted by the CSRA. Preemption is necessary because "[b]oth the CSRA and its legislative history show that congress did not intend that state tort law operate within the interstices of the act." *Saul v. United States*, 928 F.2d at 842; accord *David v. United States*, 820 F.2d 1038, 1043 (9th Cir. 1987).

Blankenship also alleged a claim under 42 U.S.C. Section 1985(2) which prohibits conspiracies "to deter, by force, intimidation, or threat, any party or witness in any

court of the United States . . . from testifying to any matter pending therein, freely, fully and truthfully." Blankenship claimed that the defendants conspired to retaliate against her for giving testimony in the EEO hearing of a fellow employee.

We have previously held that "[a]llegations of witness intimidation under Section 1985(2) will not suffice for a cause of action unless it can be shown the litigant was hampered in being able to present an effective case." *David v. United States*, 820 F.2d at 1040. Because Blankenship was not a party to the EEO proceeding, she can show no injury under section 1985(2). *Id.*; accord *Rutledge v. Arizona Board of Regents*, 859 F.2d 732, 735 (9th Cir. 1988) (even if potential witness to plaintiff's federal action were intimidated, such intimidation had no effect on plaintiff's ability to present a case in federal court).

The judgment of the district court is AFFIRMED.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Kathryn I. BLANKENSHIP, Plaintiff-Appellant,

v.

The Honorable Alan A. McDONALD, United States District Court Judge, Eastern District of Washington, personally, and the marital community composed of Alan A. McDonald and Ruby K. McDonald; James R. Larsen, Clerk, United States District Court, Eastern District of Washington, personally, and the marital community composed of James R. Larsen and Dianne Emmons, Defendants-Appellees.

No. 97-35898.

DC# CV-97-03019-OMP
Eastern District of Washington (Yakima)

ORDER

(Filed July 22, 1999)

Before: REAVLEY,[5] LEAVY and McKEOWN, Circuit Judges.

Judge McKeown has voted to deny appellant's petition for rehearing and to deny the petition for rehearing en banc. Judges Reavley and Leavy have voted to deny the petition for rehearing and recommend denial of the petition for rehearing en banc.

The full court has been advised of the petition for rehearing en banc and no active judge has requested a

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[5] The Honorable Thomas M. Reavley, Senior United States Circuit Judge for the United States Court of Appeals, Fifth Circuit, sitting by designation.

vote on whether to rehear the matter en banc. Fed.R.App.P. 35.

The petition for rehearing and petition for rehearing en banc are denied.

Supreme Court, U.S.
FILED
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No. 99-___

In The

Supreme Court of the United States

KATHRYN I. BLANKENSHIP,

Petitioner,

v.

The Honorable ALAN A. McDONALD,
United States District Court Judge, *et al.*,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

SUPPLEMENTAL APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

JAMES E. LOBSENZ*
of CARNEY BADLEY SMITH & SPELLMAN
2200 Columbia Center
701 Fifth Avenue
Seattle, WA 98104-7091
(206) 622-8020
**Counsel of Record*

VICTORIA VREELAND
of GORDON THOMAS HONEYWELL MALANCA PETERSON & DAHEIM
600 University Street,
Suite 2100
Seattle, WA 98101-4185
(206) 447-9505

Counsel for Petitioner

October 18, 1999

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

KATHRYN I. BLANKENSHIP, Plaintiff,

v.

THE HONORABLE ALAN A. McDONALD, United States District Court Judge, Eastern District of Washington, personally, and the marital community composed of ALAN A. McDONALD and RUBY K. McDONALD; JAMES R. LARSEN, Clerk, United States District Court, Eastern District of Washington, personally, and the marital community composed of JAMES R. LARSEN and L. DIANNE EMMONS, Defendants.

No. CY-97-3019-FVS

OPINION

(Filed August 22, 1997)

PANNER, J.

Plaintiff Kathryn I. Blankenship brings this employment discrimination action against defendants Alan A. McDonald, United States District Judge for the Eastern District of Washington (Eastern District); Judge McDonald's wife, Ruby K. McDonald; James R. Larsen, Clerk of the Court for the Eastern District; and Larsen's wife, Dianne Emmons. Plaintiff, a former court reporter for Judge McDonald, claims that defendants retaliated against her for testifying at another employee's hearing.

Defendants move to dismiss for lack of subject matter jurisdiction and failure to state a claim. I grant the motion.

BACKGROUND

The following allegations are taken from plaintiff's complaint. Plaintiff was Judge McDonald's official court reporter from 1985 to 1995, first in Spokane and later in Yakima.

In February 1994, Christine Mearns, a former court employee, filed a complaint against the Clerk's Office, alleging sex and handicap discrimination. Mearns was granted a hearing under the Eastern District's Equal Employment Opportunity (EEO) Plan.

In July 1994, Chief Judge Justin L. Quackenbush presided over a hearing on Mearns's EEO complaint. Plaintiff testified after Chief Judge Quackenbush assured her that she should not fear retaliation and that her testimony would be confidential.

At the hearing, plaintiff testified that Judge McDonald edited her transcripts of hearings before filing and required her to make his changes while certifying that the transcripts were verbatim. Plaintiff testified that Judge McDonald required her to notarize improper signatures on personal documents; to draft incorrect and unauthorized reimbursement requests; to perform secretarial work for his private business on court time; and to conceal information during a government audit. Plaintiff also testified that Judge McDonald and his courtroom deputy clerk bothered plaintiff during court proceedings by exchanging notes with racist, insulting comments about attorneys and witnesses.

On the first working day after Mearns's hearing, Judge McDonald angrily confronted plaintiff about her

testimony. Afterwards, Judge McDonald and court staff ostracized plaintiff.

In November 1994, plaintiff was diagnosed with major depression and anxiety. She could not work.

On November 22, 1994, plaintiff received a negative performance report, which stated that she had missed deadlines for filing transcripts. Plaintiff contends that the missed deadlines were either excused, incorrectly computed, or caused by Judge McDonald's editing.

Larsen offered plaintiff a voluntary transfer from Yakima to Spokane, which plaintiff refused. In December 1994, Larsen wrote plaintiff that she would be transferred to Spokane on February 1, 1995, and that she would be on probation. Plaintiff remained on sick leave.

In February 1995, Larsen notified plaintiff by letter that he would recommend that the court terminate her. Plaintiff responded in writing that the stated reasons for terminating her were pretextual. By letter dated February 13, 1995, signed by Judges McDonald, Quackenbush, Wm. Fremming Neilsen, and Fred VanSickle, plaintiff was terminated effective March 3, 1995. Plaintiff did not file an EEO discrimination claim.

STANDARDS

The court should not grant a motion to dismiss for failure to state a claim under Rule 12(b)(6) unless it appears beyond doubt that the plaintiff can prove no facts in support of the claim. *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). The court should construe the complaint in the light most favorable to the plaintiff. *Rosen v. Walters*, 719 F.2d 1422, 1424 (9th Cir. 1983).

DISCUSSION

I. Bivens Claims

A. Standards

In *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971), the Supreme Court created a private right of action for damages against federal officials who violate a person's constitutional rights. *Walleri v. Federal Home Loan Bank of Seattle*, 83 F.3d 1575, 1583 (9th Cir. 1996). The Court has been cautious about creating new remedies under *Bivens*. *Id.* at 1584 (citing *Schweiker v. Chilicky*, 487 U.S. 412, 421 (1988)). "[W]here Congress has provided some mechanism for relief that it considers adequate to remedy constitutional violations, *Bivens* claims are precluded." *Moore v. Glickman*, 113 F.3d 988, 991 (9th Cir. 1997). " 'So long as Congress' failure to provide money damages, or other significant relief, has not been inadvertent, courts should defer to its judgment because "Congress is that body charged with making the inevitable compromises required in the design of a massive and complex . . . program." ' " *Brazil v. United States Dep't of Navy*, 66 F.3d 193, 198 (9th Cir. 1995) (quoting *Kotarski v. Cooper*, 866 F2d 311, 312 (9th Cir. 1989) (quoting *Chilicky*, 487 U.S. at 429)). *cert. denied*, 116 S. Ct. 1317 (1996).

B. Statutes and Rules Governing Plaintiff's Employment

I. Statutes

District courts appoint court reporters. 28 U.S.C. § 753(a). "Direct responsibility for the supervision of court

reporters rests with the district court." *In re Holloway (SECO Nevada, Inc. v. McMordie)*, 884 F.2d 476, 478 n.3 (9th Cir. 1989); 28 U.S.C. § 753(c) ("The reporters shall be subject to the supervision of the appointing court and the Judicial Conference in the performance of their duties. . . . "). Court reporters are employed by the district court en banc, not by individual judges. Admin. Office of U.S. Courts, *Court Reporters' Manual*, ch.3, at 1 (Oct. 1991) (vol. VI of *Guide to Judicial Policies and Procedures*).

Court reporters, like other judicial branch employees, are eligible for back pay if improperly terminated, 5 U.S.C. § 5596(a)(2); severance pay, 5 U.S.C. § 5595(a)(1)(E); per diem allowances, 5 U.S.C. § 5701(1)(D); part-time career options, 5 U.S.C. § 3401(1)(C), and subject to anti-nepotism rules, 5 U.S.C. § 3110(a)(1)(C).

The parties dispute whether plaintiff, as a judicially appointed court reporter, was a member of the "excepted service" under the Civil Service Reform Act of 1978 (CSRA) (codified as amended in scattered sections of 5 U.S.C.). I agree with defendants that plaintiff was in the excepted service.

"[T]he 'civil service' consists of all appointive positions in the executive, judicial, and legislative branches of Government of the United States, except positions in the uniformed services." 5 U.S.C. § 2101(1). "Excepted service" employees are "those civil service positions which are not in the competitive service of the Senior Executive Service." 5 U.S.C. 2103(a). Because plaintiff was a judicial appointee who did not fit the CSRA's definitions of competitive service or the Senior Executive Service, she was a member of the excepted service. *See Fagan v. Bingham*,

Civ. A. No. 94-11399-GAO, 1955 WL 791916, at *2 (D. Mass. Nov. 29, 1995) chief deputy clerk for bankruptcy court was a judicial employee, not in competitive service, and therefore in the excepted service under the CSRA); *Hartman v. Merit Sys. Protection Bd.*, 77 F.3d 1378, 1379 & n.3 (Fed Cir. 1996) (deputy clerk for a U.S. District Court was not in competitive service); *Garcia v. Williams*, 704 F. Supp. 984, 990 (N.D. Cal. 1988) (secretary to federal judge was in excepted service). Plaintiff is not an employee of the Administrative Office of the United States Courts. *See Hartman*, 77 F.3d at 1380 (deputy clerks are court personnel, not Administrative Office employees).

2. Court Reporter Management and EEO Plans

"In 1982, responding to abuses in court reporter services, the Judicial Conference recommended that circuit judicial councils require each district court 'to develop a court reporting management plan that will provide for the day-to-day management and supervision of an efficient court reporting service within the court,' and specifically assign supervision responsibilities. . . . If required, the plan must be approved by the circuit judicial council and filed with the Administrative Office. . . . " Federal Judicial Ctr., *Deskbook for Chief Judges of U.S. District Courts* 58 (2d ed. 1993) (citation omitted). The Eastern District's Management Plan for Court Reporting and Recording Services (Management Plan), adopted with the approval of the Ninth Circuit Judicial Council, provides that "[c]ourt reporters are employed by the court en banc and shall retain employment at the will of the court en banc regardless of the death, resignation or retirement of

an individual judge." Defts.' Mem. In Support, Appendix A, at 4.[1] The Management Plan also provides that "[d]iscipline and/or sanctions of reporters/recorders shall be pursuant to the provisions of this Plan and/or the Personnel Manual of the Court." *Id.* at 18.

The Eastern District's EEO Plan allows an employee to bring a discrimination complaint if the employee has been retaliated against for "serv[ing] as a . . . witness . . . in connection with a complaint." Defts.' Mem. in Support, Appendix B, Appendix 1, at 2. When an employee files a discrimination complaint, the EEO Coordinator may investigate the complaint and attempt to resolve it informally. The EEO Coordinator then prepares findings and recommendations describing the issues, the resolution, if any, and corrective actions.

A party may object to the EEO Coordinator's findings and recommendations and seek review from the Chief Judge (or the Chief Judge's designee). The Chief Judge must then decide whether to investigate further, interview the parties, or hold a formal hearing. If the Chief Judge determines that no hearings or interviews are necessary, the Chief Judge issues a final decision within forty-five days of the request for review.

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[1] The Eastern District's management plan for court reporters and its EEO Plan are not part of the pleadings. On a motion to dismiss, I "may take judicial notice of matters of public record outside the pleadings." *MGIC Idem. Corp. v. Weisman*, 803 F.2d 500, 504 (9th Cir. 1986).

If a formal hearing is held, the parties have the right to representation, to present evidence, and to cross-examine adverse witnesses. The Chief Judge must issue a final decision within thirty days after the hearing.

The EEO Plan does not authorize damages if an employee prevails on a discrimination complaint. However, the Back Pay Act allows judicial employees to receive back pay for adverse personnel actions determined by the "appropriate authority" to have been "unjustified or unwarranted." 5 U.S.C. § 5596(b)(1). Applying the Back Pay Act with the EEO Plan, a terminated judicial employee who prevails on a discrimination complaint "may be reinstated and awarded lost salary." *Fultz v. Waldron*, Civ. A. No. 93-891, 1994 WL 146361, at *4 (D. N.J. Apr. 19, 1994) (*Bivens* claim brought by deputy clerk at Bankruptcy Court precluded by combination of court's EEO Plan and Back Pay Act).

C. Discussion

Plaintiff's *Bivens* claims are precluded. Congress has given judicial employees benefits, such as back pay and severance pay, while withholding other benefits, showing that Congress's failure to provide a more complete set of remedies is not inadvertent. *Moore*, 113 F.3d at 993. In 1990, when Congress amended the Back Pay Act to cover judicial employees, the House Report on the bill noted, "While employees of the Administrative Office are already covered under existing law, the remaining employees of the judicial branch are not." H.R. Rep. 101-770(I), at 12, *reprinted in* 1990 U.S.C.C.A.N. 1709,

1717. This court should not create a remedy if Congress has chosen not to act. *See Moore*, 113 F.3d at 993.

The court noted in *Fultz* that Congress has shown a "constitutional deference" to the judicial branch, delegating authority to the Judicial Conference and Councils. *Fultz*, at *7. Congress created the predecessor to the Judicial Conference in 1922 to "serve as the principal policy making body concerned with the administration of the United States Courts." Admin. Office of U.S. Courts, *Judges' Manual*, ch. I, at 1 (Feb. 1988) (vol. III of *Guide to Judiciary Policy and Procedures*); 28 U.S.C. § 331. Congress created the Administrative Office and the judicial councils in 1939 because "it was determined that the courts themselves should play a central role in managing their affairs." *Id.*, ch. II, at 1; 28 U.S.C. § 332 (judicial councils).

When Congress created a separate statutory scheme for employees of the Administrative Office of the United States Courts, the House Report emphasized the need for the judicial branch to manage its employees independently:

> The Administrative Office is, to a large extent, currently subject to the control of the executive branch in personnel matters. The United States courts, which it serves, however, are mostly free of such Executive Branch supervision. The purpose of H.R. 4174 is to authorize the establishment of an independent, self-contained personnel management system within the Administrative Office which is free from executive branch controls and more similar to that of the rest of the judicial branch. While it may be convenient to have the personnel system of this agency covered by the personnel management

> network of the executive branch, it is contrary to the doctrine of separation of powers.

H.R. Rep. 101-770(I), at 5, *reprinted in* 1990 U.S.C.C.A.N. at 1710. "[C]ongressional deference may explain the dearth of legislative activity in this area concerning judicial personnel." *Fultz*, at *7.

Plaintiff cites *Garcia v. Williams*, 704 F. Supp. 984, 990-92 (N.D. Cal. 1988), which held that a legal secretary could bring *Bivens* claims against her employer, a United States district court judge. *Garcia*, however, was decided before Congress amended the Back Pay Act to include judicial employees. *See Fultz*, at *7 (distinguishing *Garcia*). More importantly, *Garcia* was decided before the Supreme Court held that the adequacy of existing remedies was not relevant to whether a *Bivens* action is precluded. *See Moore*, 113 F.3d at 994 (citing *Chilicky*, 487 U.S. at 423). "A finding of preclusion is premised only on an alternative scheme and some indication that Congress deliberately elected not to include complete relief." *Id.*

I recognize that the remedies available to plaintiff are incomplete compared to those that would be available in a *Bivens* action. Under the EEO Plan, the Chief Judge's decision on a discrimination complaint appears to be final, and the EEO coordinator's decision is not necessarily reviewable at a formal hearing. *Fultz*, at *10 n.11. Nevertheless, because Congress's failure to provide more complete remedies was not inadvertent, no *Bivens* action is available to plaintiff. *See Paige v. Cisneros*, 91 F.3d 40, 44 (7th Cir. 1996) (enactment of the CSRA "strengthens the

conclusion that *Bivens* remedies have no place in individual personnel disputes arising out of federal employment.").

II. Due Process Claims

Plaintiff claims that defendants deprived her of property and liberty interests protected by the Fifth Amendment.

A. Property Interest

For plaintiff to have a protected property interest in her employment, she "must show more than an expectation in continued employment; [she] must demonstrate a claim of entitlement to continued employment." *DiMartini v. Ferrin*, 906 F.2d 465, 467 (9th Cir. 1990). Plaintiff has no property interest in her employment because she served at the will of the Eastern District judges en banc. 28 U.S.C. §§ 753, 756; Management Plan at 4 ("Court reporters are employed by the court en banc and shall retain employment at the will of the court en banc"). *See Mareno v. Re*, 568 F. Supp. 17, 20 (S.D.N.Y.) (statute providing that federal judge's legal assistant "shall be subject to removal by the court" "is inimical to the concept of a property interest in employment by the court. Rather, the language is consistent with the concept of service at the pleasure of the court, and removal without cause."), *aff'd* 742 F.2d 1430 (2d Cir. 1983) (table). Chief Judge Quackenbush's alleged oral reassurance that plaintiff would not suffer retaliation for testifying cannot supersede the statutes and regulations governing the employment of court reporters. *See Bollow v. Federal Reserve Bank*, 650 F.2d 1093,

1099 (9th Cir. 1981) (bank officer's promise of employment security did not create an enforceable property interest because Federal Reserve Act of 1913 established employee's at-will status); *Williams v. McClellan*, 569 F.2d 1031, 1033 (8th Cir. 1978) (docket clerk for federal court had no protected property interest in employment).

B. Liberty Interest

"A person's liberty interest is implicated if a charge impairs [her] reputation for honesty or morality." *Erickson v. United States ex rel. Dep't of Health and Human Servs.*, 67 F.3d 858, 862 (9th Cir. 1995). A person may also have a protected liberty interest if she disputes the accuracy of charges leading to her termination and the defendants disclose the charges to the public. *Id.* To determine what process is due when the plaintiff has a protected liberty or property interest at stake, the court balances the risk of an erroneous deprivation, the government's interest in providing specific procedures, and the importance of the individual's interest. *Id.* at 863.

Here, defendants allegedly stated that plaintiff had missed filing deadlines for transcripts and had rejected a transfer to Spokane. Those alleged statements are not sufficiently stigmatizing to harm plaintiff's reputation for honesty or morality. *See Garcia*, 704 F. Supp. at 995 (plaintiff must show that stigma seriously damages reputation or significantly forecloses ability to obtain other work); *Sipe v. Fritz*, 43 B.R. 984, 994-95 (D. Ariz. 1984) (discharged deputy clerk for Bankruptcy Court had no protected liberty interest because the defendant's termination letter stated only that the deputy clerk had

managed her cases poorly and reassigned cases without court approval). Plaintiff also does not allege that defendants' statements were disclosed to the public. *See Sipe*, 43 B.R. at 994-95 (no liberty interest because the termination letter was not disclosed publicly).

Even assuming that plaintiff had a protected liberty interest at stake, her claim fails because she received all the process due her. Plaintiff was notified in writing of the allegations against her, allowed to respond in writing, and given the opportunity for a hearing. That was sufficient to protect her due process rights. *See Paige v. Cisneros*, 91 F.3d 40, 44 (7th Cir. 1996).

Plaintiff contends that a hearing would not have been before an impartial tribunal. However, she gives no reasons why the Chief Judge would be biased against her.

III. Claims Under 42 U.S.C. § 1985(2)

Plaintiff brings claims under 42 U.S.C. § 1985(2), alleging that defendants conspired to injure her because of her testimony at the EEO hearing. Plaintiff now concedes, however, that her section 1985 claim is not cognizable because she was not a party to the proceeding in which she testified. *David v. United States*, 820 F.2d 1038, 1040 (9th Cir. 1987).

IV. State Law Claims

Plaintiff brings state law claims against defendants for intentional infliction of emotional distress. Because plaintiff is in the excepted service under the CSRA, her state law claims are preempted. *Saul v. United States*, 928

F.2d 829, 840-43 (9th Cir. 1991). In *Saul*, the Ninth Circuit held that "[e]ven where the CSRA provided Saul no remedy, preemption of his work-related tort claims is necessary to fulfill congressional intent." *Id.* at 843.

Plaintiff contends that because she could make these claims even if she were still employed by the court or had voluntarily resigned, the claims are not related to her work. I disagree. I don't see how plaintiff's claims can logically be separated from her work. If plaintiff had not been a court reporter working for Judge McDonald, she would not have been subjected to his alleged misconduct.

CONCLUSION

Defendant's motion to dismiss (##) is granted.

DATED this 19th day of August, 1997.

OWEN M. PANNER
U.S. DISTRICT COURT JUDGE

Supreme Court, U.S.
FILED
JAN 19 1999
CLERK

(3)

No. 99-672

In the Supreme Court of the United States

KATHRYN I. BLANKENSHIP, PETITIONER

v.

ALAN A. MCDONALD, JUDGE,
UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF WASHINGTON, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

SETH P. WAXMAN
Solicitor General
Counsel of Record

DAVID W. OGDEN
Acting Assistant Attorney General

MARLEIGH DOVER
ROBERT M. LOEB
Attorneys

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

7100

QUESTIONS PRESENTED

1. Whether petitioner stated a claim under 42 U.S.C. 1985(2) of a conspiracy to injure a party or witness on account of testimony before a "court of the United States," when she was not a party to the proceeding at issue, and the proceeding was an administrative hearing.

2. Whether an employee of the judicial branch may bring an action under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), against a district court clerk and judge regarding the termination of her employment, even though Congress has established a comprehensive remedial scheme for job-related disputes involving federal employees under which judicial branch employees have only limited remedies.

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In the Supreme Court of the United States

No. 99-672

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v.

ALAN A. MCDONALD, JUDGE,
UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF WASHINGTON, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-7) is reported at 176 F.3d 1192. The opinion of the district court (Supp. App. 1-14) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 14, 1999. A petition for rehearing was denied on July 22, 1999 (Pet. App. 8-9). The petition for writ of certiorari was filed on October 12, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1985, pursuant to the authority granted by Congress, 28 U.S.C. 753, 756, the District Court for the Eastern District of Washington appointed petitioner to the position of court reporter. Pet. App. 2. Petitioner worked primarily in the courtroom of respondent United States District Court Judge Alan A. McDonald. Respondent James Larsen, the Clerk for the Eastern District of Washington, supervised the court reporters. *Ibid.*

The Eastern District has adopted an equal employment opportunity (EEO) plan in conformance with the directions of the Judicial Conference. See Discrimination Complaint Procedures, Equal Employment Opportunity Plan, United States District Court for the Eastern District of Washington (Mar. 1993) (*reprinted in* C.A. E.R. 86-100). The EEO plan provides an administrative complaint and hearing mechanism to resolve claims of discrimination and retaliation or reprisal for alleging discrimination or serving as a witness in connection with an EEO complaint. Supp. App. 6-8.

In February 1994, deputy clerk Christine Mearns filed an administrative complaint of sex and handicap discrimination under the Eastern District's EEO Plan. Supp. App. 2. Petitioner was subpoenaed to testify at the administrative EEO hearing on the complaint. Pet. App. 3; Supp. App. 2. Petitioner alleges that, during the course of her testimony at the EEO hearing, she testified that Judge McDonald had required her to act improperly on several occasions, such as requiring her improperly to certify and to notarize documents. *Ibid.* Petitioner claims that following her testimony at the EEO hearing her relationship with Judge McDonald deteriorated. C.A. E.R. 9-10.

In November 1994, petitioner received a negative performance report, which stated that she had missed deadlines for filing transcripts. Supp. App. 3. In February 1995, respondent Larsen recommended that the District Court terminate petitioner's employment. Pet. App. 4. The Court discharged petitioner effective March 3, 1995. C.A. E.R. 14. Each of the then-active judges in the Eastern District signed the termination letter. Pet. App. 4; Supp. App. 3. Petitioner did not file a complaint under the Eastern District EEO Plan. *Ibid.*

2. Petitioner filed suit in federal district court against Judge McDonald, Clerk Larsen, and their wives. Supp. App. 1. Alleging that she was fired in retaliation for her testimony at the EEO hearing, she asserted claims under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), for violations of her First and Fifth Amendment rights, as well as claims under 42 U.S.C. 1985(2) and (3) and state law. C.A. E.R. 15-23. She sought compensatory, exemplary and punitive damages. *Id.* at 23-24.

The district court granted respondents' motion to dismiss. Supp. App. 1-14. The court held that petitioner's *Bivens* claims were precluded under the analysis set forth in *Schweiker* v. *Chilicky*, 487 U.S. 412 (1988). Supp. App. 4, 8-11. The court reasoned that Congress's failure to provide petitioner and other judicial branch employees with a more complete remedy was not inadvertent. *Ibid.* The district court also dismissed petitioner's remaining claims. *Id.* at 11-14. As to the Section 1985(2) claim, the district court noted that petitioner conceded that "her section 1985 claim is not cognizable [under Ninth Circuit precedent] because

she was not a party to the proceedings in which she testified." *Id.* at 13.

3. Petitioner appealed the district court's ruling, and the court of appeals affirmed. Pet. App. 1-7. The court rejected petitioner's argument "that because she has no administrative or judicial remedies under the [Civil Service Reform Act] as a member of the excepted service, she is entitled to assert a *Bivens* claim." *Id.* at 4-5. The court held that the Civil Service Reform Act (CSRA) contains an "elaborate remedial system that has been constructed step by step, with careful attention to conflicting policy considerations." *Id.* at 5 (quoting *Bush* v. *Lucas*, 462 U.S. 367, 388 (1983)). The court held that it would be improper to permit a *Bivens* action here because "congressional action has not been inadvertent in providing certain remedies and denying others to judicial employees." Pet. App. 6. The court explained that "Congress has given judicial employees certain employment benefits and remedies, such as back pay, severance pay, family and medical leave, and health and retirement benefits. Congress has withheld other benefits and remedies, such as review of adverse personnel decisions." *Ibid.* The court concluded that "[t]his demonstrates that the lack of more complete remedies was not inadvertent." *Ibid.* The court also rejected petitioner's claim under 42 U.S.C. 1985(2) because, in *David* v. *United States*, 820 F.2d 1038, 1040 (1987), the Ninth Circuit had previously held that Section 1985(2) provides a remedy only to a litigant who is hampered in presenting an effective case, not to a witness. Pet. App. 7.

ARGUMENT

The court of appeals correctly affirmed the district court's dismissal of petitioner's complaint. Petitioner

did not state a valid claim under Section 1985(2) because her testimony in an administrative EEO hearing is not testimony before a "court of the United States." This case therefore is not a suitable vehicle to resolve the conflict among the courts of appeals on the question whether Section 1985(2) provides a remedy to witnesses as well as litigants. Further, the court of appeals correctly dismissed petitioner's *Bivens* claims, and its decision does not present a conflict with any other court of appeals that warrants this Court's review. This Court recently denied review of the *Bivens* issue raised by petitioner. See *Lee* v. *Hughes*, 145 F.3d 1272 (11th Cir. 1998), cert. denied, 119 S. Ct. 1026 (1999). Review of that issue is likewise not warranted here. Therefore, the petition should be denied.

1. Petitioner first contends (Pet. 8-14) that this Court's review is needed to resolve a conflict among the courts of appeals regarding the construction of 42 U.S.C. 1985(2). Although there is a conflict, this case does not present a suitable vehicle to resolve it, because petitioner cannot state a claim under Section 1985(2) regardless of how the Court might resolve the conflict.

Section 1985(2) prohibits conspiracies "to deter, by force, intimidation, or threat, any party or witness in any court of the United States * * * from testifying to any matter pending therein, freely, fully, and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified." 42 U.S.C. 1985(2). The statute permits a "party" so injured to sue for recovery of damages "occasioned by such injury." 42 U.S.C. 1985(3).

The Ninth Circuit has construed the statute to provide a damages remedy only to a "litigant [who] was hampered in being able to present an effective case," and not to a witness who is not a party. *David* v. *United*

States, 820 F.2d 1038, 1040 (1987). See also *Rylewicz* v. *Beaton Servs., Ltd.*, 888 F.2d 1175, 1180 (7th Cir. 1989). This construction has been rejected by the Third and Tenth Circuits. See *Heffernan* v. *Hunter*, 189 F.3d 405, 409-411 (3d Cir. 1999); *Brever* v. *Rockwell Int'l Corp.*, 40 F.3d 1119, 1125 & n.7 (10th Cir. 1994).

This case does not, however, present a suitable vehicle for resolving the conflict on the question whether the statute provides a remedy to a non-party witness, because petitioner has not stated a valid claim under Section 1985(2) however that question might be resolved. The statute applies only to testimony before a "court of the United States." 42 U.S.C. 1985(2). That term includes only courts (such as federal district courts) created by Act of Congress "the judges of which are entitled to hold office during good behavior." 28 U.S.C. 451. Petitioner's complaint here fails to state a Section 1985(2) claim because the testimony for which she allegedly was terminated was testimony in an administrative EEO hearing, *not* before a court of the United States sitting in its Article III capacity. Every court that has addressed the issue has held that Section 1985(2) does not encompass testimony given at an administrative proceeding. See *Deubert* v. *Gulf Fed. Sav. Bank*, 820 F.2d 754, 758 (5th Cir. 1987); *Morast* v. *Lance*, 807 F.2d 926, 930 (11th Cir. 1987); *Kimble* v. *D.J. McDuffy, Inc.*, 648 F.2d 340, 347 (5th Cir.) (en banc), cert. denied, 454 U.S. 1110 (1981); *Graves* v. *United States*, 961 F. Supp. 314, 319 (D.D.C. 1997); *Carter* v. *Church*, 791 F. Supp. 298, 300 (M.D. Ga. 1992) (testimony to EEOC not covered).

In the court of appeals, petitioner did not contest that Section 1985(2) is limited to proceedings before a "court of the United States." Petitioner argued, however, that the administrative EEO hearing at which she testified

should be deemed such a court because the hearing was conducted by Chief Judge Quackenbush in a courtroom. Plaintiff's Opp. to Motion to Dismiss 23-24 (C.A. E.R. 124-125). That argument lacks merit, because Judge Quackenbush was presiding over an administrative proceeding, pursuant to the Eastern District's EEO Plan, C.A. E.R. 97-98, and was not sitting in his capacity as an Article III judge over an Article III case or controversy.[1]

2. Petitioner also asks (Pet. 14-24) this Court to review the dismissal of her *Bivens* claims. In accord with the Eleventh Circuit's ruling in *Lee*, *supra*, however, the court of appeals correctly rejected petitioner's contention that judicial branch employees may bring *Bivens* claims against their supervisors for work-related disputes. This Court recently denied the petition for a writ of certiorari in *Lee*. 119 S. Ct. 1026 (1999). It should likewise deny the petition in this case.

a. In *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), the Court permitted the plaintiff to sue for money damages federal officers who violated his Fourth Amendment

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[1] In her reply brief on appeal, petitioner claimed (for the first time) that the retaliation she alleged was based in part on testimony that she gave earlier in a civil case and in a disciplinary hearing against an attorney. Appellant Reply Br. 22. In her complaint, however, petitioner claimed retaliation based on only her testimony at the administrative EEO hearing. The complaint did not mention her testimony in the civil case and referenced her testimony at the attorney disciplinary hearing only in describing the events about which she testified at the EEO hearing. Complaint 7-8 (C.A. E.R. 7-8). Moreover, in her response to respondents' motion to dismiss in district court, petitioner identified only her testimony at the EEO hearing as the testimony protected from retaliation under Section 1985(2). Plaintiff's Opp. to Motion to Dismiss 23-24 (C.A. E.R. 124-125).

rights. In permitting that suit, the Court relied on several important considerations: (1) Congress had not provided a remedy; (2) there were "no special factors counselling hesitation in the absence of affirmative action by Congress"; and (3) there was "no explicit congressional declaration" that money damages not be awarded. *Id.* at 396-397. Following *Bivens*, the Court permitted similar damage actions against federal officials under the Fifth Amendment's Due Process Clause and the Eighth Amendment's Cruel and Unusual Punishments Clause. Again, each time the Court noted the absence of an alternative remedial scheme created by Congress and the absence of other "special factors" counseling against the provision of a court-created damages remedy. See *Davis* v. *Passman*, 442 U.S. 228, 245-247 (1979); *Carlson* v. *Green*, 446 U.S. 14, 18-20 (1980).

This Court's "more recent decisions have responded cautiously to suggestions that *Bivens* remedies be extended into new contexts." *Schweiker* v. *Chilicky*, 487 U.S. 412, 421 (1988). See also *FDIC* v. *Meyer*, 510 U.S. 471, 484 (1994). The Court has held that *Bivens* actions against individual federal officials are precluded when Congress has established a statutory remedial scheme to handle a particular category of disputes with the federal government, even if the remedial scheme does not provide redress for the particular alleged constitutional wrong. See *Chilicky*, *supra*; *Bush* v. *Lucas*, 462 U.S. 367 (1983). "When the design of a Government program suggests that Congress has provided what it considers adequate remedial mechanisms for constitutional violations that may occur in the course of its administration," it is inappropriate for a court to afford "additional *Bivens* remedies." *Chilicky*, 487 U.S. at 423. The "concept of 'special factors counselling

hesitation in the absence of affirmative action by Congress' has proved to include an appropriate judicial deference to indications that congressional inaction has not been inadvertent." *Ibid.*

Petitioner cannot maintain a *Bivens* action here because Congress has, through the Civil Service Reform Act (CSRA), Pub. L. No. 95-454, 92 Stat. 1111, established a comprehensive statutory remedial scheme to handle employment disputes with the federal government. In the CSRA, Congress "comprehensively overhauled the civil service system," *Lindahl* v. *OPM*, 470 U.S. 768, 773 (1985), and created a "new framework for evaluating adverse personnel actions against [federal employees]," *id.* at 774. The CSRA details the protections and remedies available to federal employees in such actions, including the availability of administrative and judicial review. See *United States* v. *Fausto*, 484 U.S. 439, 443 (1988). That "elaborate remedial system," which "has been constructed step by step, with careful attention to conflicting policy considerations," may not "be augmented by the creation of a new judicial remedy for the constitutional violation at issue." *Bush*, 462 U.S. at 388.

b. Petitioner argues (Pet. 19-21) that the CSRA does not preclude her *Bivens* action, because, as a preference-eligible member of the excepted service (Pet. App. 4), she had no right to file a petition challenging the adverse personnel action with the Office of Special Counsel of the Merit Systems Protection Board. The court of appeals correctly rejected that contention. See *id.* at 4-6; *Lee*, 145 F.3d at 1275-1276. In *Bush*, this Court found that the "comprehensive procedural and substantive provisions" (462 U.S. at 368) of the CSRA constituted a "special factor counselling" hesitation against permitting a *Bivens* action even though civil

service remedies offered "a less than complete remedy" for the alleged First Amendment violation (*id.* at 372-373). That conclusion applies with equal force to petitioner's First and Fifth Amendment claims here.

The courts may not circumvent Congress's decision in the CSRA not to provide a statutory review mechanism for claims like petitioner's by permitting *Bivens* actions. This Court rejected that approach in *Fausto*, when it held that the CSRA precluded an exempt, non-preference eligible, federal employee from suing under the Back Pay Act even though the CSRA did not provide the employee a right to judicial review of the claims that he asserted. Because the CSRA is a comprehensive scheme and Congress's failure to provide judicial review could not be deemed an inadvertent omission, the Court held that the limitations in the Act may not be circumvented through resort to other remedies. *Fausto*, 484 U.S. at 447-455.[2]

Congress has deliberately excluded court personnel from the substantive provisions of the CSRA relating to adverse employment actions. Instead, Congress has extended only limited employment benefits and remedies to court personnel. Most significantly, judicial employees are entitled to backpay plus interest under

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[2] The Court applied the same reasoning in *Chilicky*. In that case, the plaintiff claimed that federal officials administering the Social Security disability program violated his due process rights. 487 U.S. at 420. If limited to the Social Security review scheme, the plaintiff at most could have been granted retroactive disability benefits, and had *no* possibility of receiving additional redress for the harms caused by the alleged constitutional violation. Further, the Act provided no monetary remedy against the alleged offending officials. *Id.* at 424-425. The Court nonetheless held that the Social Security Act's "remedial scheme" precluded the assertion of a *Bivens* claims against the individual officials. *Id.* at 414.

certain circumstances, 5 U.S.C. 5596 (1994 & Supp. IV 1998), as well as severance pay, 5 U.S.C. 5595.[3] In the main, Congress has permitted the judicial branch to manage its own personnel matters. Thus, district courts have the authority to appoint and remove court reporters, 28 U.S.C. 753 (1994 & Supp. III 1997); 28 U.S.C. 756, and the Judicial Conference has the authority to "determin[e] standards" for the qualifications of court reporters. 28 U.S.C. 753 (1994 & Supp. III 1997). In 1990, Congress removed the employees of the Administrative Office of the United States Courts (AO) from the CSRA. See AO Personnel Act of 1990, Pub. L. No. 101-474, § 3(a)(5), 104 Stat. 1097, Congress explained that the "separation of powers" counseled that the judicial branch should be "mostly free" of executive branch supervision of its personnel matters. See H.R. Rep. No. 770, 101st Cong., 2d Sess. 5 (1990).[4]

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[3] Court-appointed personnel are also covered by the Family and Medical Leave Act, 5 U.S.C. 6381(1) (1994 & Supp. IV 1998), and the Federal Employees Family Friendly Leave Act, 5 U.S.C. 6301(2). They are entitled to employment benefits such as health insurance, 5 U.S.C. 8901(1)(A) (1994 & Supp. III 1997), life insurance, 5 U.S.C. 8701(a)(1), and retirement benefits, 5 U.S.C. 8331(1)(A) (1994 & Supp. IV 1998).

[4] Although petitioner is not an employee of the AO and thus does not have remedies under the 1990 Act, those remedies are similar to petitioner's remedies under the court-adopted EEO plans and the Back Pay Act. In the 1990 Act, Congress ordered the AO to create an administrative scheme similar to the one available to petitioner here to handle employment disputes, including those involving claims of discrimination and claims of retaliation or reprisal for invoking or participating in the EEO process. See H.R. Rep. No. 770, *supra*, at 5, 7-8. At the same time, Congress extended the Back Pay Act to provide a back pay remedy in addition to the administrative review scheme. *Id.* at 12. Congress referred to the 1990 Act as establishing a "comprehensive

Those decisions reflect Congress's determination regarding the appropriate balance between respect for the independence of the judicial branch and protection of the rights of judicial branch personnel. Recognition of the *Bivens* action that petitioner seeks to bring would upset that congressionally mandated balance.

c. Petitioner also errs in suggesting (Pet. 21-24) that this case raises a constitutional question because, she asserts, she lacked any remedy to vindicate her constitutional rights. Whether or not the Constitution requires that there be a remedy to vindicate every constitutional right, petitioner had an adequate remedy here. Petitioner could have sought review of her retaliation claim through the administrative EEO process adopted by the district court at the direction of the Judicial Conference, as contemplated by Congress. See pp. 2, 11, *supra*. The court's EEO plan provides informal and formal administrative procedures to resolve complaints (such as petitioner's) of discrimination and reprisal. C.A. E.R. 87-100.[5] Had she prevailed in

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personnel system" (*id.* at 1) for AO employees and recognized that this comprehensive system was similar to that available to "the rest of the judicial branch" (*id.* at 5). Thus, Congress demonstrated its approval of the remedies available to petitioner here by extending the same remedies to AO employees.

[5] When a complaint is filed, the court-appointed EEO Coordinator conducts an investigation and prepares a report. If the EEO Coordinator recommends rejection of the employee's claim, the complainant may ask that the matter be further reviewed. Upon receipt of such a request, the Chief Judge or his designee conducts any additional investigation deemed necessary, determines whether to hold a formal hearing, and issues a final decision regarding the complaint. C.A. E.R. 95-99. There is no merit to petitioner's contention (Pet. 22 n.9) that this procedure is inadequate because the Clerk of the Court is a party to her complaint and the Chief Judge was one of the judges who signed her

that process, petitioner would have been able to seek reinstatement from the Chief Judge. She would also have been entitled to restoration of any lost pay, with interest, under the Back Pay Act.[6]

d. Petitioner's reliance (Pet. 16-19) upon *Davis* v. *Passman*, 442 U.S. 228 (1979), is misplaced. In *Davis*, the Court permitted a former congressional staff member to bring a *Bivens* action for sex discrimination against a congressman. In *Davis*, however, the Court did not address the preclusive effect of the CSRA, which had been enacted only a few months before *Davis* was decided. *Lee*, 145 F.3d at 1275. Moreover, in *Bush*, the Court explained that it had relied upon the absence of *any* equitable or monetary remedy for the terminated staff member in permitting the *Bivens* action in *Davis*. See 462 U.S. at 377 & n.13. Unlike petitioner here, the plaintiff in *Davis* had no remedial process and no opportunity for back pay or reinstatement. See also

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discharge order. The procedures provide for an impartial investigator if the EEO Coordinator is directly involved in the complaint, as well as for a designee to fulfill the duties of the Chief Judge. C.A. E.R. 97.

[6] Under the Back Pay Act, a covered federal employee who is found "by appropriate authority under applicable law, rule, [or] regulation" to have been "affected by an unjustified or unwarranted personnel action" resulting in a loss of pay is entitled, "on correction of the personnel action," to the lost pay with interest. See 5 U.S.C. 5596(b)(1)(A) and (b)(2)(A). The duly adopted EEO Plan constitutes an "applicable law, rule, [or] regulation," and a decision that an employee was improperly discharged would be a finding by an "appropriate authority" that the employee was "affected by an unjustified or unwarranted personnel action," thus entitling the employee, "on correction of the personnel action" (5 U.S.C. § 5596(b)(1)(A)) to back pay, with interest. See *Fausto*, 484 U.S. at 454 (within CSRA scheme, agency is an "appropriate authority" for purposes of Back Pay Act).

462 U.S. at 390-391 (Marshall, J., concurring) (Congress considered a remedy under the Back Pay Act to provide full compensatory relief for adverse employment actions in violation of the First Amendment).

e. Finally, petitioner errs (Pet. 14-15) in contending that this Court's review is warranted to resolve a conflict among the courts of appeals on the *Bivens* issue.

Like the petitioner in *Lee* v. *Hughes*, *supra*, petitioner here cites *Duffy* v. *Wolle*, 123 F.3d 1026 (8th Cir. 1997), cert. denied, 523 U.S. 1137 (1998), as creating a conflict. That purported conflict does not warrant this Court's review. The Eighth Circuit in *Duffy* was not presented with the considerations central to the reasoning of the court in this case; and, when presented with those considerations in a future case, the Eighth Circuit might well reach the same result as the court did here.

In *Duffy*, the Eighth Circuit held that a court-adopted EEO Plan, standing alone, did not preclude a probation officer from asserting a *Bivens* sex discrimination claim against the judges who elected not to promote him to the position of Chief Probation Officer. *Duffy*, 123 F.3d at 1034-1035. As the Eleventh Circuit noted in *Lee*, however, "the defendants in *Duffy* never suggested that the CSRA preempted plaintiff's claim, but rather argued only that plaintiff's *Bivens* claim should have been dismissed because the local EEO Plan provided plaintiff with a remedy." *Lee*, 145 F.3d at 1276 n.4. Thus, the Eighth Circuit did not address the effect on *Bivens* claims of the CSRA, the central consideration behind the decision of the court of appeals in this case.

Moreover, in *Duffy* the Eighth Circuit relied on the defendants' failure to "present[] * * * support" for the

conclusion that the remedial scheme available to judicial employees did not result from congressional inadvertence. *Duffy*, 123 F.3d at 1035. As we have explained at pages 10-11, *supra*, there is in fact substantial evidence that Congress deliberately chose to provide judicial personnel with certain, limited remedies, including the Back Pay Act, and otherwise to permit the judicial branch to manage its personnel matters. That evidence was not considered by the Eighth Circuit in *Duffy*. Indeed, the court in *Duffy* erroneously believed that there were no statutory remedies available to judicial branch employees.

Guercio v. *Brody*, 814 F.2d 1115 (6th Cir. 1987), also does not support further review here. In *Guercio*, the Sixth Circuit held that a bankruptcy judge did not possess absolute immunity from a First Amendment retaliation claim brought by his former secretary. The claim at issue in *Guercio* was not an EEO claim, nor was it redressable through an EEO administrative hearing. The question whether a *Bivens* action by a judicial branch employee is permitted in light of the CSRA, a court-created EEO plan, and the Back Pay Act remedy was never briefed by the parties and was not addressed by the Sixth Circuit. Hence, the Sixth Circuit's decision does not conflict with the reasoning or decision of the court of appeals here.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General[7]

DAVID W. OGDEN
Acting Assistant Attorney General

MARLEIGH DOVER
ROBERT M. LOEB
Attorneys

JANUARY 2000

[7] Respondents were represented by private counsel in the court of appeals but requested that the Department of Justice represent them in this Court. This brief is filed in our capacity as counsel for the individual respondents, not on behalf of the United States, which is not a party to this litigation.

Supreme Court, U.S.
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(4)

No. 99-672

In The

Supreme Court of the United States

KATHRYN I. BLANKENSHIP,

Petitioner,

v.

THE HONORABLE ALAN A. McDONALD, UNITED STATES DISTRICT COURT JUDGE, EASTERN DISTRICT OF WASHINGTON, ET AL.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITIONER'S REPLY TO BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

JAMES E. LOBSENZ*
OF CARNEY BADLEY SMITH & SPELLMAN
2200 Columbia Center
701 Fifth Avenue
Seattle, WA 98104-7091
(206) 622-8020
*Counsel of Record

VICTORIA VREELAND
OF GORDON THOMAS HONEYWELL MALANCA PETERSON & DAHEIM
600 University Street, Suite 2101
Seattle, WA 98101-4185
(206) 447-9505

Counsel for Petitioner

January 28, 2000

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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ARGUMENT IN REPLY

A. THE SOLICITOR GENERAL ACKNOWLEDGES THAT THERE IS A CONFLICT BETWEEN THE CIRCUITS AND HE RECENTLY ADVISED THIS COURT IN ANOTHER CASE THAT THE NINTH CIRCUIT'S CONSTRUCTION OF § 1985(2) IS ERRONEOUS.

The Solicitor General admits that there is a split in the circuit courts on the issue of whether 42 U.S.C. § 1985(2) affords a remedy to a nonparty witness, acknowledging that the more recent decisions of the Third and Tenth Circuits have rejected the Ninth and Seventh Circuits' view that only a witness who is also a party litigant can bring suit under the statute. *Brief in Opposition to Certiorari*, at pp. 5-6. *Compare Heffernan v. Hunter*, 189 F.3d 405, 409-11 (3d Cir. 1999); *Brever v. Rockwell Internat'l Corp.*, 40 F.3d 1119, 1125 (10th Cir. 1994); and *Langley v. Adams County, Colorado*, 987 F.2d 1473 (10th Cir. 1993); with *David v. United States*, 820 F.2d 1038, 1040 (9th Cir. 1987) and *Rylewicz v. Beaton Services*, 888 F.2d 1175, 1180 (7th Cir. 1989).

But the Solicitor General fails to mention the fact that in his *Brief for the United States as Amicus Curiae Supporting Petitioner* submitted to this Court in *Haddle v. Garrison*, 525 U.S. 121, 119 S.Ct. 489, 491, n.3, 142 L.Ed.2d 502 (1998), he advised this Court that the United States believed that the Ninth Circuit's position was incorrect. In that brief the Solicitor General urged this Court to reject respondent Garrison's contention that Haddle could not bring a § 1985(2) action because he was not a party witness:

> [R]espondents suggest that Section 1985(2) (clause i) provides a remedy in damages only for parties to litigation. Although the remedy clause (Section 1985(3) (clause iii) uses the term "party" when it describes who may sue for damages under the statute, that term is used as a synonym for "person" and is not intended to restrict actions for damages to parties to a court proceeding. *See Brever v. Rockwell Int'l Corp.*, 40 F.3d 1119, 1125 & n.7 (10th Cir. 1994). Because the remedy clause applies to

> actions based on all the conspiracies prohibited by Section 1985, most of which do not even involve court proceedings, reading "party" as limited to a party to a judicial proceeding would vitiate the statute. In fact, as enacted, the statute used the word "person" rather than "party." *See* 17 Stat. 14 (reprinted at App., *infra*, 5a). The substitution of the term "party" occurred when all federal statutes were consolidated in the Revised Statutes, and as explaining at note 2, *supra*, the consolidation was not intended to change the meaning of the statutes.

Brief for the United States as Amicus Curiae Supporting Petitioner, 1998 WL 430030, at 47, n.27.

Thus the Solicitor General does not and cannot argue that the decision below is correct.

B. THE PRESENCE OF ANOTHER ISSUE WHICH THE NINTH CIRCUIT FAILED TO DISCUSS DOES NOT MAKE THIS CASE ANY LESS SUITABLE FOR RESOLUTION OF THE CIRCUIT CONFLICT ON THE QUESTION OF WHETHER SECTION 1985(2) AFFORDS A REMEDY TO NONPARTY WITNESSES.

The Solicitor General, acting solely in his capacity as counsel for the individual respondents, and not as counsel for the United States, suggests that "this case does not . . . present a suitable vehicle for resolving the conflict on the question whether the statute provides a remedy to a nonparty witness," because there is another issue in the case which the Circuit Court did not discuss. Section 1985(2) applies to testimony given before a "court of the United States." Despite the uncontested facts that petitioner Blankenship was placed under oath by a United States District Court Judge, and that she gave her testimony in a United States courtroom located inside a United States federal courthouse, the Solicitor General suggests that Blankenship has no cause of action because "[t]he statute applies only to testimony before a 'court of the United States.' " *Brief for the*

Respondents in Opposition, at p. 6.[1] Therefore the Solicitor General argues that even though the Ninth Circuit's decision based on the construction of the word "party" is erroneous, and even though there is a split in the Circuits on this important question, this Court should not take this case to resolve the conflict because ultimately Blankenship cannot win this lawsuit.

The logic of the Solicitor General's position is obviously flawed. Whether or not Blankenship will ultimately lose her lawsuit because the District Court Judge she testified before was not a "court of the United States" is immaterial to the question of whether her case presents an apt vehicle for resolving the conflict as to whether a nonparty witness has a cause of action under Section 1985(2). This Court can and should grant certiorari to resolve that conflict. If, after resolving it, this Court agrees with Blankenship that a nonparty witness does have an action under Section 1985, then this Court can do one of two things.

One option would be to simply remand the case to the Ninth Circuit for further consideration, thus allowing the Circuit Court to resolve the issue of whether testimony before a U.S. District Court Judge in a United States Courthouse constitutes testimony in a "court of the United States." This is precisely the approach this Court took in *Haddle v. Garrison, supra.* In *Haddle* this Court granted certiorari to resolve a conflict on one issue involving Section 1985(2), took note that there were two other issues, one of which was the very same issue which is now presented by this case, reversed the Circuit Court and remanded for further consideration on the remaining issue:

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[1] The Solicitor General's strategic and adversarial placement of quotation marks obscures the fact that the word "before" does not appear in the statute. The actual operative language refers to conspiracies directed against "any party or witness *in* any court of the United States from attending such court, or from testifying to any matter pending therein." It is not disputed that physically Blankenship was "in" a United States courthouse when she gave her testimony.

> We express no opinion regarding respondents' argument that intimidation claims under Section 1985(2) are limited to conduct involving force or threat of force, or their argument that only litigants and not witnesses, may bring Section 1985(2) claims. **We leave those issues for the courts below to resolve on remand.**

Haddle v. Garrison, 119 S.Ct. at 491, n.3 (emphasis added).

The second option would be for this Court to decide the remaining issue itself. Neither the Circuit Court nor the District Court even bothered to discuss respondent McDonald's contention that the testimony that Blankenship gave before Judge Quackenbush was not testimony "in a court of the United States." From this one could infer that the lower courts thought this argument was wholly without merit.

If there is a factual point to be made, it is simply that the District Court was not conducting the business of a lawsuit pending before it when Blankenship's testimony was taken. But the clear language of the statute states that the witness need not be testifying in connection with a lawsuit. The statute prohibits conspiracies to deter "any party or witness in any court of the United States from attending such court, or from testifying ***to any matter pending therein***, freely, fully, and truthfully . . . " 42 U.S.C. § 1985(2) (emphasis added).

Blankenship's testimony was given to a District Court Judge who was handling an internal grievance filed by a deputy clerk. While the grievance may not have been a lawsuit, it was obviously "a matter pending" in the District Court. And the District Court Judge who presided over that matter did not suddenly cease to be a District Court Judge exercising the power of a court of the United States. The respondents' lame contention that the statute only covers testimony given in connection with a lawsuit is belied by the express wording of the statute which encompasses *"any matter pending"* in a federal court.

The Solicitor General cites cases in support of the proposition that 1985(2) "does not encompass testimony given at

an administrative proceeding." *Brief for Respondents in Opposition*, at p. 6. Of course *none* of the cases cited involved testimony given before a United States District Court Judge, or any other judicial officer.

In sum, this Court could choose to simply address this additional issue itself, or it could choose to leave it to the Ninth Circuit to resolve on remand. But in either event, the presence of this additional strained contention of respondents provides no reason why this Court should not resolve the conflict among the circuit courts on the issue of whether Section 1985(2) affords a remedy to nonparty witnesses.

C. THE SOLICITOR GENERAL DOES NOT ADDRESS PETITIONER'S CONTENTION THAT THE NINTH CIRCUIT'S RATIONALE FOR REFUSING TO RECOGNIZE *BIVENS* ACTIONS IS INCONSISTENT WITH BOTH THE ELEVENTH AND EIGHTH CIRCUITS' DECISIONS.

In *Lee v. Hughes*, 145 F.3d 1272, 1275-76 (11th Cir. 1998), *cert. denied*, 119 S.Ct. 1026 (1999), the Eleventh Circuit declined to address the EEO Plan/Back Pay Act theory advanced by both the judicial employer in *Duffy v. Wolle*, 123 F.3d 1026 (8th Cir. 1997) and by the respondents in this case, and held instead that in light of Congress' intentional omission from the Civil Service Reform Act ("CSRA") of *any* statutory remedy for constitutional wrongs suffered by federal court employees, the courts should decline to recognize the existence of a *Bivens* action. The Eleventh Circuit found it "troubling" that judicial employees had no remedy whatsoever for constitutional wrongs, but felt that the separation of powers doctrine required courts to defer to Congress on this point. *Id.* at 1276.

In the present case, however, the Ninth Circuit held that the CSRA precludes a *Bivens* remedy due to the existence of other benefits and remedies which show that "the lack of more complete remedies was not inadvertent." *Blankenship v. McDonald*, 176 F.3d 1192, 1195 (9th Cir. 1999). Thus the two decisions are inconsistent. One recognizes that judicial employees have no remedies at all, the other opines that they

do have some "remedies" but that they are somehow simply "less complete" than they could be.

Moreover the Ninth Circuit was less than clear about the source of Blankenship's "less than complete remedy." The Ninth Circuit mentioned the CSRA, but did not actually mention either the Back Pay Act or District Court EEO plans, even though respondents' entire argument in the District Court was that the combination of the Back Pay Act and the EEO Plan for the District Court of the Western District of Washington sufficed to give Blankenship a constitutionally adequate remedy.

The Ninth Circuit did state: "Congress has given judicial employees certain employment benefits and remedies, such as *back pay*, severance pay, family and medical leave, and health and retirement benefits." *Blankenship*, 176 F.3d at 1195. *None* of these benefits, however, were extended to judicial employees by the CSRA. The family and medical leave benefits are attributable to the Family and Medical Leave Act, 5 U.S.C. § 6381 and the Federal Employees Family Friendly Leave Act, 5 U.S.C. § 6301(2). The retirement, health insurance and life insurance benefits were granted pursuant to still other statutes. Moreover, all of these benefits are irrelevant to the issues presented by this case, since *none* of them give a judicial employee the right to contest his or her discharge. Benefits are not "remedies"; the purpose of benefits is not to rectify a wrongfully inflicted injury.

The Back Pay Act does provide for a remedy. But it provides that back pay can be awarded *only* when the employee "is found by appropriate authority under applicable law, rule, regulation, or collective bargaining agreement to have been affected by an unjustified or unwarranted personnel action" which led to a loss of compensation. 5 U.S.C. § 5596(b)(1). Thus standing alone the Back Pay Act provides Blankenship and other judicial employees with no remedy at all. Unless they can find some "appropriate authority" which can decide under some other "applicable law, rule [or] regulation" that their discharge was unjustified, they still have no remedy at all. *Walker v. United States*, 11 Ct.

Cl. 77 (1986); *Leistiko v. Secretary of the Army*, 922 F.Supp. 66, 75 (N.D. Ohio 1996), *affirmed*, 134 F.3d 817 (6th Cir. 1998).

Respondents argued in the District Court that a District Court Judge's decision in an EEO grievance proceeding in favor of a judicial branch employee premised upon a substantive provision of the EEO Plan, would amount to the required finding by an "appropriate authority." But the Ninth Circuit's decision in this case doesn't mention the District Court's EEO plan for handling internal court grievances, even though such a proceeding was the *only* mechanism that respondents identified as a possible trigger for favorable Back Pay Act relief. Thus the only relevant "less than complete remedy" for the redress of an unconstitutional discharge of a judicial branch employee depends on the existence of an internal grievance procedure in a judicial EEO Plan which includes a provision authorizing the reinstatement of a discharged employee.

But it is illogical to infer that *Congress* intended for an internal judicial EEO Plan to preclude a *Bivens* action. Such EEO plans are not Congressionally mandated. Judicial EEO plans are adopted by courts, not by Congress. Since they do not constitute "congressional action" at all, they are not probative of Congressional intent in the least.

In *Duffy* the Eighth Circuit specifically held that a *judicial* EEO plan could not be read as demonstrating a *Congressional* intent to limit judicial employees to whatever administrative remedies were provided in those plans so as to justify the conclusion that Congress meant to preclude a *Bivens* action. *Duffy*, 123 F.3d at 1034. Thus in addition to conflicting with the CSRA rationale underlying the Eleventh Circuit's decision in *Hughes*, it also conflicts with the rationale and the result of the Eighth Circuit's decision in *Duffy*. *See, Petition*, at 17-18. The Solicitor General's response does not address these inconsistencies and conflicts between the Circuit Courts' decisions.

The Solicitor General also argues that Petitioner's reliance on *Davis v. Passman*, 442 U.S. 228, 99 S.Ct. 2264, 60 L.Ed.2d 846 (1979) is misplaced, because this Court did not address the preclusive effect of the CSRA enacted only a few

months before *Davis* was decided. However, the rule of *Davis* remains valid: In the absence of an explicit declaration that a certain class of persons may not recover for discrimination claims, the mere fact that Congress leaves some employees with no statutory remedies does *not* preclude a *Bivens* claim. The Solicitor General argues that unlike petitioner, the plaintiff in *Davis* had no remedial mechanism available. As argued above, petitioner has no *congressionally-enacted* remedial process available to her, and thus the courts should not infer that Congress meant for her to have no judicially recognized *Bivens* remedy either.

D. A DISTRICT COURT EEO PLAN CANNOT SERVE AS A CONSTITUTIONALLY-ADEQUATE REMEDY FOR A CONSTITUTIONAL WRONG PERPETRATED BY THE DISTRICT COURT ITSELF.

In *Bush v. Lucas*, 462 U.S. 367, 378, n.14, 103 S.Ct. 2404, 76 L.Ed.2d 648 (1983), this Court reserved the question of "whether the Constitution itself requires a judicially fashioned damages remedy in the absence of any other remedy to vindicate the underlying right." The Solicitor General argues that petitioner had an adequate remedy to vindicate her constitutional rights by seeking review of her retaliation claim through the administrative EEO process adopted by the district court at the direction of the Judicial Conference. The Solicitor General contends that the EEO process is adequate because it provides for appointment of an impartial investigator and a designee to fulfill the duties of the Chief Judge. *Respondents Brief*, at p. 12, & n.5.

Nevertheless, the EEO Plan is not constitutionally-adequate, because its implementation depends solely upon the unreviewable conduct of the Chief Judge, who issues the final decision. In this case the Chief Judge was one of the three judges who fired Blankenship. EEO Plan guidelines for appointment of an impartial investigator and designee for the Chief Judge can be ignored by the Chief Judge with no redress. Further, the EEO Plan is not a congressionally-enacted remedy. Its continued existence and provisions are at

the discretion and within the power of the Judicial Conference and the district court. It could be eliminated at any time *without* any congressional decision or action. This is not the constitutionally-adequate remedy contemplated in *Bush*.

E. THE FACT THAT CONGRESS HAS PERMITTED THE JUDICIAL BRANCH TO MANAGE ITS OWN PERSONNEL MATTERS DEMONSTRATES THAT CONGRESS DID NOT INTEND TO PRECLUDE JUDICIAL EMPLOYEES FROM BRINGING *BIVENS* ACTIONS

Respondents note the exclusion of court personnel from the coverage of Congressional statutes pertaining to discrimination and employment can be traced to a Congressional desire not to interfere in the internal affairs of the judiciary. "In the main, Congress has permitted the judicial branch to manage its own personnel matters." *Brief for the Respondents in Opposition*, at 11. Respondents point to the commentary to Congress' decision to remove the employees of the Administrative Office of the United States Courts from the CSRA, where "Congress explained that the 'separation of powers' counseled that the judicial branch should be 'mostly free' of executive branch supervision of its personnel matters." *Id.* Respondents argue that these "decisions reflect Congress's determination regarding the appropriate balance between respect for the independence of the judicial branch and protection of the rights of judicial branch personnel." *Id.* at p. 12.

Respondents fail to realize that Congressional recognition of the independence of the judicial branch, and a Congressional desire to let the judiciary manage its own personnel affairs, actually *contradicts* the position they have taken in this case. The contention that Congress meant to *forbid* the courts from recognizing the availability of a *Bivens* action to a judicial branch employee is completely inconsistent with the contention that Congress meant to *recognize judicial independence*. Congress cannot simultaneously intend to leave the judiciary free to regulate its own personnel

matters, and also intend to prohibit the courts from entertaining *Bivens* suits brought by judicial branch employees.

In *Hughes* the Eleventh Circuit held that given "the long-respected separation of powers doctrine" the judiciary was compelled to decline to authorize a constitutional remedy since "Congress has intentionally withheld one." *Hughes*, 145 F.3d at 1276. And yet the Solicitor General maintains in this case that Congress has been trying to defer to the courts in this area, out of respect for the independence of the judiciary.

In sum, from the admitted fact that it has deliberately left the judiciary "mostly free" to manage its own personnel affairs, it is far more logical to conclude that Congress did *not* intend for its exclusion of judicial branch employees from the CSRA to have the effect of signalling to the judiciary that it did not want the courts to recognize the viability of a *Bivens* remedy for constitutional wrongs.

CONCLUSION

For these reasons petitioner Blankenship asks this Court to grant certiorari to review the decision of the United States Court of Appeals for the Ninth Circuit.

DATED this 28th day of January 2000.

Respectfully submitted,

James E. Lobsenz
Counsel of Record

Victoria Vreeland
Attorneys for Petitioner